TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1896.

No. 276. 44. A. 3 1.

THE MAYOR, ALDERMEN, AND COMMONALTY OF THE CITY OF NEW YORK AND JAMES A. GALLAGHER, APPELLANTS,

vs.

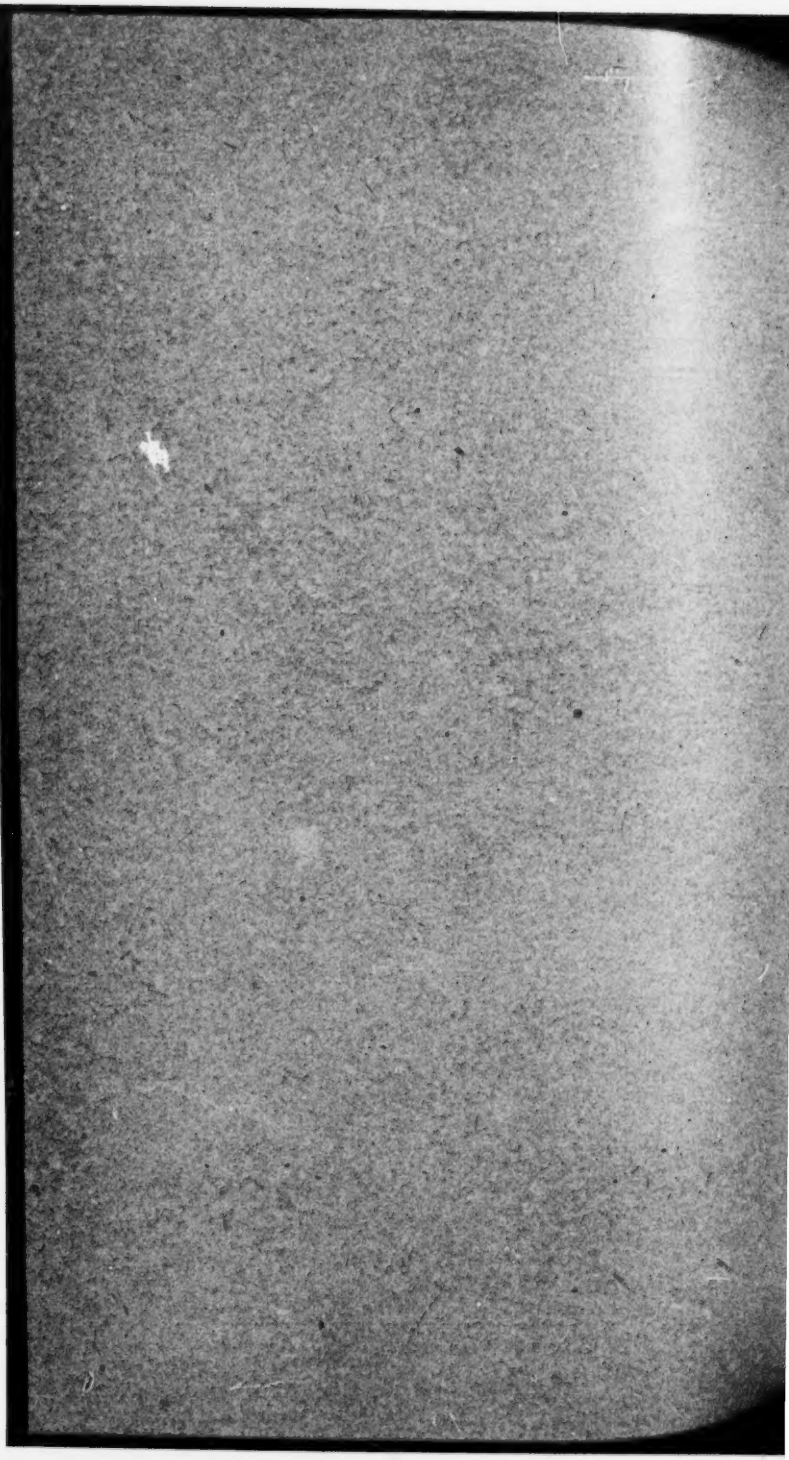
ROBERT W. WORKMAN.

A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

PETITION FILED MAY 29, 1896.

CERTIORARI AND RETURN FILED JUNE 1, 1896.

(15,906.)



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ON A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

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1 U. S. District Court, Southern District of New York.

ROBERT W. WORKMAN, Libellant and Appellee,
against
THE MAYOR, ALDERMEN, AND COMMONALTY OF THE CITY OF NEW York and James A. Gallagher, Respondents and Appellants, Impleaded with The Fire Department of the City of New York.

Statement.

1893, July 27. Libel filed.
Aug. 8. Answer, Mayor, &c., filed.
Nov. 8. Order to show cause why libel should not be amended granted.
9. Motion to amend libel argued.
10. Opinion, Brown, J., on motion to amend libel.
15. Order granting motion to amend libel entered.
Dec. 1. Amended libel filed.
12. Answer of respondent Gallagher filed.
12. Exceptions to libel filed by Fire Department.
19. Exceptions to libel filed by Fire Department argued.
27. Order sustaining exceptions filed.

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1894, Jan'y 2. Amendment to amended libel filed.
18. Answer of Fire Department filed.
April 9. } Cause tried before Hon. Addison Brown, U. S.
10. } district judge.
Aug. 15. Opinion rendered by Brown, J., awarding libellant a decree against the Mayor, Aldermen, &c., of New York and James A. Gallagher.
30. Final decree entered.
Sept. 6. Notice of appeal (Mayor, &c.) filed.
14. Assignment of errors (do.) do.
6. Notice of appeal (Gallagher) do.
12. Assignment of errors (do.) do.

3 To the Honorable Addison Brown, judge of the district court of the United States for the southern district of New York:

The libel of Robert W. Workman, of Belfast, Ireland, owner of the barkentine *Linda Park*, her tackle, apparel, &c., against the Mayor, Aldermen and Commonalty of the City of New York, owners of the steam fireboat *New Yorker*, in a cause of action, civil and maritime, for collision and damages, alleges as follows:

First. That at the times hereinafter mentioned the libelant was and is now a resident of Belfast, Ireland, and the owner of the barkentine *Linda Park*, her tackle, apparel, &c., which is an iron vessel of 324 tons register and a first-class vessel in every respect.

Second. That said Mayor, Aldermen and Commonalty of the City

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of New York at the times hereinafter mentioned were and now are a municipal corporation, duly incorporated, organized and existing under the laws of the State of New York, and were the owners of the steam fireboat *New Yorker* hereinafter referred to, which at the times hereinafter mentioned was officered and manned and navigated by the servants, agents and employees of said corporation.

Third. That on Sunday, the 11th day of June, in the year 1893, the said barkentine *Linda Park* was lying with a full cargo on board and ready for sea safely moored alongside of the pier or dock at the foot of Clinton street, East river, known as pier 48, in said city of New York, where she had a perfect right to be. That the barkentine laid on the east side of said pier. A schooner laid ahead of her on the same side of the pier and a barge laid along the port side of the said barkentine. That the weather was fine, the wind easterly, blowing a moderate breeze, and the tide was running flood. About 4.30 p. m. on that day a fire broke out in one of the warehouses across the street from said slip, and soon the fire-engines appeared and the fireboat *William Havemeyer* came into the said slip
4 between the said barge and the next pier to the eastward and commenced playing on the fire. That she was soon followed by the fireboat *New Yorker*. The said fireboat *New Yorker*, instead of going straight into the slip, came from the eastward in a crosswise direction into said slip and ran with great force and violence her bow underneath the bowsprit of said barkentine, prying the same up and carrying away all the headgear, bobstays, martingale, bowsprit, shrouds and gear attached thereto, and breaking a steel hawser and doing other considerable damage, and bringing up at last against the pier, which the barkentine was lying alongside of, with a heavy blow, which left the mark of her stem on the said pier. That the said fireboat immediately backed out into the river again and then came straight forward into the slip, as she should have done in the first place, and went alongside the fireboat *William Havemeyer* and commenced playing on the fire. That the said barkentine was remoored again at her bow alongside said pier, and soon the captain of the fireboat *New Yorker* came on board of the barkentine. He informed the officer in charge of said barkentine that it was not his, the captain's, fault, but it was the fault of the engineer of the fireboat, for he said that he gave the engineer the proper bells to stop the boat, but that he did not obey them, and that the city was responsible for the damages done to said barkentine, and that if the same were presented they would be paid.

Fourth. That said collision was without any fault or negligence on the part of the libelant or those in charge of his said barkentine, but was wholly due to the fault and negligence of those in charge of the steam fireboat *New Yorker*:

1. In that they had no proper and sufficient lookout, properly stationed, in the faithful discharge of his duties.

2. In that they failed to keep out of the way of the libelant's said barkentine, but ran directly into the same, doing the damage before alleged.

5 3. In that said steam fireboat *New Yorker*, when she found that she was going to run into said barkentine, did not stop and back and try to avoid the same.

4. In not being properly officered and manned, and in not having a competent engineer in charge of her engine, to promptly give heed to the orders given and to execute the same.

5. And in other respects, which the libelant will show on the trial of this action.

Fifth. That by reason of said collision the libelant has sustained damages in the sum of $908.48 for the repairs to said barkentine and the delay and expenses incident thereto.

Sixth. That on the 23d day of June, 1893, the libelant duly presented his claim as above set forth to the comptroller of the city of New York for adjustment in the manner prescribed by the statutes in such case made and provided. That more than 30 days have elapsed since such presentment, and said comptroller has neglected and refused to make an adjustment thereof for 30 days after such presentment, and the same has not been adjusted or paid.

Seventh. All and singular the premises are true and within the admiralty and maritime jurisdiction of this honorable court.

Wherefore, the libelant prays that process in due form of law and according to the rules and practice of this court in cases of admiralty and maritime jurisdiction may issue against the said respondent, owner of the said steam fireboat *New Yorker*, her engines, boilers, etc., and that it may be directed to pay to the libelant the claim of libelant aforesaid, amounting in all to $908.48, with interest thereon and the costs of this action, and that he may have such other and further relief as in law and justice he may be entitled to receive.

ROBERT W. WORKMAN,
By WING, SHOUDY & PUTNAM, *Proctors.*

6 SOUTHERN DISTRICT OF NEW YORK, }
City and County of New York, } ss:

Joseph A. Shoudy, being duly sworn, says: That he is one of the proctors for the libelant in the above-entitled suit; that he has read the foregoing libel and believes the same to be true; that the grounds of his belief are from interviews had respecting the said collision and examination of documents in reference to the repairs of the said barkentine; that the reason why this verification is made by deponent and not by the libelant, is that the libelant is a non-resident and is not now within the United States.

J. A. SHOUDY.

Sworn to before me this 26th day of July, 1893.

JAMES FORRESTER,
[SEAL.] *Notary Public, Kings Co.*

Cert. N. Y. Co.

WING, SHOUDY & PUTNAM,
Proctors for Libelant.

(Endorsed:) Libel. Filed July 27, 1893.

7 To the Honorable Addison Brown, judge of the district court of the United States for the southern district of New York:

The answer of the Mayor, Aldermen and Commonalty of the City of New York to the libel of Robert W. Workman alleges as follows and respectfully shows to the court:

First. The respondent denies that it has any knowledge or information sufficient to form a belief as to any of the allegations in the first article of the libel herein contained.

Second. The respondent admits that at the times in the said libel mentioned it was, and still is, a municipal corporation created and existing under and by virtue of the provisions of its ancient charters and the laws of the State of New York, and that it was the owner of a certain steam fireboat, the *New Yorker*, as in the second article of the libel herein alleged.

It denies that the said steamboat *New Yorker* was at the times in the said libel mentioned officered, managed and navigated by the servants, agents, and employees of the respondent, as in the second article of the said libel alleged, but on the contrary avers that the said steam fireboat *New Yorker*, although owned by the respondent, was not at any of the times mentioned in said libel under respondent's control or management, it being under the exclusive direction and in the keeping and custody of the board of fire commissioners of the city of New York, and used solely in and about the business of the said commissioners in the discharge of their official functions in virtue of the provisions of the statute in such case made and provided, to wit, by section 424 of chapter 410 of the Laws of 1882 and the acts amendatory thereof. And respondent avers that it is, among other things, provided by statute, to wit, by section 428 of chapter 410 of the Laws of 1882 and the several acts amend-

8 atory thereof, that the said board, to wit, the board of fire commissioners, shall have power to select the heads of bureaus and assistants and as many officers and firemen as may be necessary, and the same shall at all times be under the control of the said board, and perform such duties as may be assigned to them by the said commissioners. That the said fireboat *New Yorker* was at all of the times in said libel mentioned officered, manned and navigated by persons selected by the said board of fire commissioners, and at the times in said libel mentioned wholly under the control of the said board, and engaged in the performance of such duties as had been assigned to them by the said fire commissioners.

Third. On information and belief, the respondent denies all of the allegations except as hereinafter admitted in the third article of the said libel contained.

Fourth. On information and belief, the respondent denies all of the allegations contained in the fourth article of the libel herein.

Fifth. On information and belief, the respondent denies that the libelant has sustained damages in the sum of $908.48, as in the fifth article of the libel herein alleged, but the respondent avers, on information and belief, that the said damage, if any, was for a much less sum.

Sixth. The respondent admits that on or about the 23d day of June, 1893, the libelant presented to the comptroller of the city of New York a claim for the amount in the said libel stated, and that more than thirty days have elapsed since said claim was presented, and that no adjustment thereof has been made, as in the sixth article of the libel herein alleged, but the respondent avers that while, as provided by statute, to wit, by section 123 of chapter 410 of the Laws of 1882, after the presentation of the said claim as aforesaid, the comptroller did require the person presenting said claim to be sworn before him touching said account or claim, and when
9 so sworn to answer orally as to any facts relative to the justness of such account or claim, and fixed a day certain for the appearance and examination touching the said claim of the person presenting the same, that nevertheless the libelant herein, or the person presenting the claim, acting in his behalf, failed and neglected and refused to appear to be sworn and examined as required by law, at the time designated by the comptroller of the city of New York.

Seventh. The respondent admits the jurisdiction, but denies, on information and belief, all of the other allegations in the seventh article of the libel herein contained.

Eighth. And for further answer to the libel herein and touching the said collision therein complained of, on information and belief, the respondent avers the truth to be that on or about the 11th day of June last, the fireboat *New Yorker*, between four and half past four in the afternoon of that day, being called thereto by telegraphic signal, left the place where she was moored, to wit, at the foot of Castle Garden, in the North river, and properly officered, manned and appointed, and in charge of a skillful pilot, who was at all the times hereinafter mentioned at the wheel and diligently engaged in attending to his duties, proceeded around the Battery and up the East river, and in order safely to enter the slip between pier 48 and pier 49, in the East river, and reach the bulkhead to attach her hose, observing when she reached a point to the south of pier 48, that the fireboat *Havemeyer* lay along the end of pier 48, manœuvering to effect her entrance into the slip, and that along the northerly side of pier 48 was lying, from the bulkhead out, a barkentine, and from the end of the pier line, heading in towards the bulkhead, a schooner, occupying some 20 or 30 feet of the open water between the said two piers, 48 and 49, and from the pier line, in along the southerly side of pier 49, lay a railroad float, occupying some 35 or 40 feet
10 of the open water between the said two piers, and it being the duty of the fireboat *New Yorker* to proceed with all possible dispatch into said slip, and up to the bulkhead lying between said piers 48 and 49, the pilot in charge of and navigating the fireboat *New Yorker*, heading out a sufficient distance into the East river, proceeded up to a point above pier 49 and then headed down, so as to make the open water between the said piers 48 and 49; and, with the tide running as it was, was compelled, in order to avoid a collision with the railroad float, lying along the southerly side of pier 49 to proceed at a moderate rate of speed into the said slip, in order

to keep said fireboat under control, and make his proper connections at the bulkhead.

That owing to the crowded condition of the slip and to the state of the tide and the necessity of making the slip under certain headway, the said fireboat *New Yorker*, without any fault on the part of those in charge of and navigating the said boat, came into collision with a barkentine lying along the northerly side of said pier 48, which your respondent, on information and belief, admits to have been the barkentine *Linda Park*.

And on information and belief respondent avers that the said collision and any subsequent damage resulting therefrom were not caused or contributed to by any fault or negligence on the part of the steam fireboat *New Yorker* or of the persons in charge of and navigating her, but that the said collision was unavoidable on her part.

Wherefore respondent prays that the libel be dismissed with costs.

WILLIAM H. CLARK,
Counsel to the Corporation, Proctor for Respondent.

JAMES M. WARD, *Of Counsel.*

11 CITY AND COUNTY OF NEW YORK, *ss:*

Richard A. Storrs, being duly sworn, deposes and says that he is an officer of the above-named respondent, The Mayor, Aldermen and Commonalty of the City of New York, to wit, deputy comptroller thereof. That he has read the foregoing answer and knows the contents thereof, and the same is true to his own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

Deponent further says that the reason why this verification is not made by the said respondent is that the respondent is a corporation.

Deponent further says that the knowledge of the matters and things set forth in the said answer is derived from various records of the said corporation and from statements made to him by officers and employees of the said corporation and of the fire department of the city of New York.

RICHARD A. STORRS.

Sworn to before me this 8th day of August, 1893.

WM. H. CLARK,
Notary Public.

(Endorsed:) Answer. Filed Aug. 8, 1893.

12 U. S. District Court, Southern District of New York.

ROBERT W. WORKMAN
vs.
THE MAYOR, ALDERMEN, AND COMMONALTY OF THE CITY OF NEW YORK.

On the annexed affidavit and all proceedings herein, it is—

Ordered, that the respondent herein show cause before me, at

the court-rooms, post-office building, in the city of New York, on the 9th day of November, 1893, at 11 o'clock in the forenoon of that day, why the libel herein should not be amended as prayed for, by making the board of fire commissioners of the city of New York and the captain of the fireboat *New Yorker* parties defendant herein.

And it is further ordered, that the service of a copy of this order on the respondent's attorneys, at or before 5 p. m. on the 8th day of November, 1893, will be sufficient.

ADDISON BROWN.

13 U. S. District Court, Southern District of New York.

ROBERT W. WORKMAN, Libelant,
vs.
THE MAYOR, ALDERMEN, AND COMMONALTY OF THE CITY OF NEW YORK.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

Henry T. Wing, being duly sworn, says that he is one of the proctors for the libelant in the above-entitled action. That this action was brought on or about the 26th day of July, 1893, by the filing of a libel on behalf of the above-named libelant as owner of the barkentine *Linda Park* against the Mayor, Aldermen and Commonalty of the City of New York, as owner of the steam fireboat *New Yorker*, to recover the sum of $903.43 for damages sustained by said barkentine in being carelessly and negligently run into by said fireboat on the 11th day of June, 1893, while the said barkentine was lying with a full cargo on board and ready for sea, safely moored alongside of the pier or dock at the foot of Clinton street, East river, in the city of New York. That the facts in regard to said collision are set forth in said libel and in the depositions taken in support of said claim, of Peter Brown, 1st officer; George Parkerson, 2d officer, and Thomas Skinner, the captain of said barkentine.

That the answer to said libel was filed on or about the 8th day of August last, and admits that the said steam fireboat *New Yorker* at the time of said collision was owned by the Mayor, Aldermen and Commonalty of the City of New York, but denies that it was under its control or management. and expressly alleges that it was
14 under the exclusive direction and in the keeping and custody of the board of fire commissioners of the city of New York, and used solely in and about the business of the said commissioners in the discharge of their official functions, and that the said fireboat was at all the times in said libel mentioned officered, manned and navigated by persons selected by the said board of fire commissioners, and at the times in said libel mentioned wholly under the control of the said board and engaged in the performance of such duties as had been assigned to them by the said fire commissioners. That if the foregoing allegations of the answer be true, deponent verily believes that the said board of fire commissioners, as well as the captain of said fireboat *New Yorker* should be made parties respond-

ent to this suit in order that the court may have all the parties before it to make a proper disposition of the case. And this deponent therefore asks this honorable court for leave to join the said board of fire commissioners and the master of said fireboat *New Yorker* as respondents in this suit.

HENRY T. WING.

Sworn to before me this 8th day of November, 1893.

JAMES FORRESTER,
Notary Public, Kings County.

[SEAL.]

Cert. N. Y. Co.

(Endorsed:) Affidavit & order to show cause. Filed Nov. 15, 1894.

15 United States District Court, Southern District of New York.

ROBERT W. WORKMAN
vs.
THE MAYOR, ALDERMEN, ETC., OF NEW YORK.

Wing, Shoudy & Putnam, for libellant.
William H. Clark (Mr. Ward), for respondents.

BROWN, *J.*:

The authorities cited in the defendant's brief make it apparently very doubtful whether the libellant can recover against the city for the faults of the fire department, however clear the fault of the *New Yorker* may be. Under such circumstances, in the interests of justice, the court is bound to grant all the facilities within its power to reach those who are legally liable. The introduction of the additional defendants by amendment cannot do any substantial prejudice to the defendant, nor subject it to any more inconvenience than is incident to ordinary cases in which additional defendants are introduced under the 59th rule of the supreme court in admiralty. Without intimating any opinion as regards the responsibility of any or all of the parties named, the motion to amend should be granted.

Nov. 10, 1893.

A. B.

16 At a stated term of the district court of the United States for the southern district of New York, held at the U. S. court-rooms, in the city of New York, on the 14th day of November, 1893.

Present: Hon. Addison Brown, judge.

ROBERT W. WORKMAN
against
THE MAYOR, ALDERMEN, AND COMMONALTY OF THE CITY OF NEW YORK.

An order to show cause having been heretofore granted herein why the libel should not be amended by making the board of fire

commissioners of the city of New York and the captain of the fireboat *New Yorker* parties defendant herein, and the motion thereon having been argued by Harrington Putnam, Esq., for the libellant, and James M. Ward, Esq., for the respondent, and due deliberation having been had, now, on motion of Wing, Shoudy & Putnam, proctors for libellant, it is—

Ordered, that the motion be and the same hereby is granted, and that the libellant herein have leave to file an amended libel herein, making the board of fire commissioners of the city of New York and the captain of the fireboat *New Yorker* parties defendant herein, without further stipulation for costs on either side.

ADDISON BROWN.

(Endorsed:) Order. Filed Nov. 15, 1893.

17 To the Honorable Addison Brown, judge of the district court of the United States for the southern district of New York:

The amended libel of Robert W. Workman, of Belfast, Ireland, owner of the barkentine *Linda Park*, her tackle, apparel, etc., against the Mayor, Aldermen and Commonalty of the City of New York, the Fire Department of the City of New York, and James A. Gallagher, in a cause of action, civil and maritime, for collision and damage, alleges as follows:

First. That at the times hereinafter mentioned the libellant was and is now a resident of Belfast, Ireland, and the owner of the barkentine *Linda Park*, her tackle, apparel, etc., which is an iron vessel of 324 tons register and a first-class vessel in every respect.

Second. That said Mayor, Aldermen and Commonalty of the City of New York at the times hereinafter mentioned were and now are a municipal corporation, duly incorporated, organized and existing under the laws of the State of New York, and were the owners of the steam fireboat *New Yorker* hereinafter referred to. That at such times the respondent, The Fire Department of the City of New York, had the custody, control and management of said fireboat *New Yorker*, and the respondent Gallagher was the acting master of said fireboat.

Third. That on Sunday, the 11th day of June, in the year 1893, the said barkentine *Linda Park* was lying with a full cargo on board and ready for sea safely moored alongside of the pier or dock at the foot of Clinton street, East river, known as pier 48, in said city of New York, where she had a perfect right to be. That the barkentine laid on the east side of said pier. A schooner laid ahead of her on the same side of the pier and a barge laid along the port side of the said barkentine. That the weather was fine, the wind easterly, blowing a moderate breeze, and the tide was running flood. About 4.30 p. m. on that day a fire broke out in one of the warehouses across the street from said slip, and soon the fire-engines appeared and the fireboat *William Havemeyer* came into the said slip,
18 between the said barge and the next pier to the eastward and commenced playing on the fire. That she was soon followed by the fireboat *New Yorker*. The said fireboat *New Yorker*, instead

of going straight into the slip, came from the eastward in a crosswise direction into said slip and ran with great force and violence her bow underneath the bowsprit of said barkentine, prying the same up and carrying away all the headgear, bobstays, martingale, bowsprit shrouds and gear attached thereto, and breaking a steel hawser and doing other considerable damage, and bringing up at last against the pier, which the barkentine was lying alongside of, with a heavy blow, which left the mark of her stem on the said pier. That the said fireboat immediately backed out into the river again and then came straight forward into the slip, as she should have done in the first place, and went alongside the fireboat *William Havemeyer* and commenced playing on the fire. That the said barkentine was remoored again at her bow alongside said pier, and soon the captain of the fireboat *New Yorker* came on board of the barkentine. He informed the officer in charge of said barkentine that it was not his, the captain's, fault, but it was the fault of the engineer of the fireboat, for he said that he gave the engineer the proper bells to stop the boat, but that he did not obey them, and that the city was responsible for the damages done to said barkentine, and that if the same were presented they would be paid.

Fourth. That said collision was without any fault or negligence on the part of the libellant or those in charge of his said barkentine, but was wholly due to the fault and negligence of those in charge of the steam fireboat *New Yorker:*

1. In that they had no proper and sufficient lookout, properly stationed, in the faithful discharge of his duties.

19 2. In that they failed to keep out of the way of the libellant's said barkentine, but ran directly into the same, doing the damage before alleged.

3. In that said steam fireboat *New Yorker* when she found that she was going to run into said barkentine did not stop and back and try to avoid the same.

4. In not being properly officered and manned, and in not having a competent engineer in charge of her engine to promptly give heed to the orders given and to execute the same.

5. And in other respects, which the libelant will show on the trial of this action.

Fifth. That by reason of said collision the libelant has sustained damages in the sum of $908.48 for the repairs to said barkentine and the delay and expenses incident thereto.

Sixth. That on the 23rd day of June, 1893, the libelant duly presented his claim as above set forth to the comptroller of the city of New York for adjustment in the manner prescribed by the statutes in such case made and provided. That more than 30 days have elapsed since such presentment, and said comptroller has neglected and refused to make an adjustment thereof for 30 days after such presentment, and the same has not been adjusted or paid.

Seventh. All and singular the premises are true and within the admiralty and maritime jurisdiction of this honorable court.

Wherefore the libellant prays that process in due form of law and according to the rules and practice of this court in cases of admiralty

and maritime jurisdiction may issue, citing the respondents above named to appear and answer the matters aforesaid, and that this court will decree to the libelant as against the respondent's payment of the claim of libelant aforesaid, amounting in all to $908.48,
20 with interest thereon and the costs of this action, and that he may have such other and further relief as in law and justice he may be entitled to receive.

ROBERT W. WORKMAN,
By WING, SHOUDY & PUTNAM, *Proctors.*

SOUTHERN DISTRICT OF NEW YORK, *ss:*

Henry T. Wing, being duly sworn, says:
I am one of the proctors of the libelant herein, who is now absent from this district and from the United States. I have read the foregoing amended libel, and the same is true to the best of my knowledge; deponent's knowledge is derived from interviews with the master of the *Linda Park* and examination of documents in connection with the matters herein set forth.

HENRY T. WING.

Sworn to before me this 29th day of November, 1893.
JAMES FORRESTER,
[SEAL.] *Notary Public, Kings Co.*
Cert. N. Y. Co.

WING, SHOUDY & PUTNAM,
Proctors for Libelant.

(Endorsed:) Amended libel. Filed Dec. 1, 1893.

21 United States District Court, Southern District of New York.

ROBERT W. WORKMAN, Libellant,
against
THE MAYOR, ALDERMEN, AND COMMONALTY OF THE CITY OF New York, The Fire Department of the City of New York, and James A. Gallagher, Respondents.

CITY AND COUNTY OF NEW YORK, *ss:*

James A. Gallagher, being duly sworn, deposes and says: That the libelant herein, as he is informed and believes, originally filed a libel against The Mayor, Aldermen and Commonalty of the City of New York, to recover damages in a cause of action, civil and maritime, for alleged injury to the barkentine *Linda Park*, done by the steam fireboat *New Yorker*, on or about the 11th day of June, 1893.

That, by order of this court, the libelant was permitted to amend his libel by bringing in as parties respondent to the said libel both the Fire Department of the City of New York and deponent, who was the pilot in charge of the fireboat *New Yorker* at the time of the said collision.

Deponent further says, that he has stated the facts in this case to his counsel, and is advised by him and verily believes that he has a good defense upon the merits.

Deponent further says that he resides in the city of New
22 York, at No. 305 West 29th street, and is employed as pilot on board the fireboat *New Yorker*, and that he is a citizen of the United States.

And deponent further says that, because of his poverty, he is unable to file the usual security for costs, which he is informed and believes is, as a rule, required upon the filing of any answer in admiralty in this court, and that he has not any friends who are able or willing to give a stipulation for costs in his behalf, so that your petitioner has been and will be unable to file his answer and defend unless he is discharged from all stipulation of costs, and permitted to defend as a poor person.

Wherefore petitioner asks to be discharged from all stipulations and liabilities for costs, and that the court direct that upon the filing of his answer the clerk be directed to receive and file the same and that as to this defendant the suit may proceed without such stipulation.

JAMES A. GALLAGHER.

Sworn to before me this 11th day of December, 1893.

W. H. BRADY,
Notary Public, N. Y. Co.

23 To the Honorable Addison Brown, judge of the district court of the United States for the southern district of New York:

The separate answer of James A. Gallagher to the libel herein respectfully shows to the court:

First. The respondent denies that he has any knowledge or information sufficient to form a belief as to any of the allegations contained in the first article of the libel herein, and, therefore, he neither admits nor denies the same, and prays that the libelants herein may be put to such proof herein as they may be advised.

Second. Respondent admits so much of the allegations contained in the second article of the libel herein as alleges that the respondent was at the times in said libel mentioned the acting master of the fireboat the *New Yorker*, but as to the other allegations in said article contained respondent denies that he has any knowledge or information touching the same, and therefore he neither admits nor denies the same and prays that the libelant may be put to such proof thereof as he may be advised.

Third. The respondent admits all of the allegations contained in the third article of the libel herein, save only and except this respondent denies, as in the said third article alleged, that the said fireboat, the *New Yorker*, immediately backed out into the river again, and then came forward into the slip, as she should have done in the first place, and went alongside the fireboat *William Havemeyer* and commenced playing on the fire.

And respondent further denies, as in said third article of the libel

herein alleged, that he informed the officer in charge of the said barkentine that it was not his (the respondent's) fault, but that it was the fault of the engineer of the fireboat, or that the engi-
24 neer of the said fireboat, the *New Yorker*, did not obey him, or that the city was responsible for the damages done to the said barkentine, or that if the same were presented they would be paid.

Fourth. Respondent denies, as in the fourth article of the libel herein alleged, that the said collision was wholly due to the fault and negligence of those in charge of the said steam fireboat, the *New Yorker*, or that the said steam fireboat, the *New Yorker*, had no proper and sufficient lookout properly stationed in the faithful discharge of his duties, or that from any fault on the part of those in charge of and navigating the *New Yorker*, the said *New Yorker* failed to keep out of the way of the libelant's said barkentine, or that from any fault on the part of the said steam fireboat the *New Yorker*, or those in charge of and navigating her, the said *New Yorker* did not stop and back and try to avoid the same, or that the said steam fireboat *New Yorker* was not properly officered or manned, and did not have a competent engineer in charge of her engine, to properly give heed to the orders given and to execute the same; but, on the contrary, this respondent avers that at the time of the said collision, and for all the time previous thereto, the said fireboat the *New Yorker* did have a proper and sufficient lookout, properly stationed and diligently engaged in the discharge of his duties, and that the said steam fireboat the *New Yorker* did stop and back and try to avoid the collision, and that the said steam fireboat, the *New Yorker*, was properly officered and manned and did have a competent engineer in charge of her engines to properly give heed to the orders given, and to execute the same.

And as to the negligence charged, in that the said fireboat, the *New Yorker*, failed to keep out of the way of libelant's said barkentine, this respondent alleges that, for the reasons hereinafter stated, the said collision was unavoidable and not to be avoided by respondent or those in charge of and navigating the said fireboat, the *New Yorker*.

25 Fifth. Respondent denies that he has any knowledge or information sufficient to form a belief as to whether or not, as in the fifth article of the libel herein alleged, the libellant has sustained damages in the sum of $908.48, for repairs to the said barkentine and the delay and expenses incident thereto or in any other sum, and therefore this respondent neither admits nor denies the same, and prays that the libelant may be put to his proof thereon.

And for a separate and further defense and touching all of the incidents and proceedings attending the collision complained of in this — the respondent alleges the truth to be:

Sixth. That on or about the 11th day of June last, the fireboat *New Yorker*, between four and half past four in the afternoon of that day, being called thereto by telegraphic signal, left the place where she was moored, to wit, at the foot of Castle Garden in the North river, and properly officered, manned and appointed and in

charge of deponent, who was at all the times hereinafter mentioned at the wheel and diligently engaged in attending to his duties, proceeded around the Battery, and up the East river, and in order safely to enter the slip between pier 48 and pier 49 in the East river, and reach the bulkhead to attach her hose, observing when she reached a point to the south of pier 48, that the fireboat *Havemeyer* lay along the end of pier 48 manœuvering to effect her entrance into the slip, and that along the northerly side of pier 48 was lying, from the bulkhead out, a barkentine, and from the end of the pier line, heading in towards the bulkhead, a schooner, occupying some twenty or thirty feet of the open water between the said two piers 48 and 49, and from the pier line, in along the southerly side of pier 49, lay a railroad float occupying some thirty-five or forty feet of the open water between the said two piers, and it being the duty of the fireboat *New Yorker* to proceed with all possible dispatch into said slip, and up to the bulkhead lying between said piers 48 and 49, deponent, in charge of and navigating the
26 fireboat *New Yorker*, heading out a sufficient distance into the East river, proceeding up to a point above pier 49, and then headed down, so as to make the open water between the said piers 48 and 49; and, with the tide running as it was, was compelled, in order to avoid a collision with the railroad float lying along the southerly side of pier 49, to proceed at a moderate rate of speed into the said slip, in order to keep said fireboat under control, and make his proper connections at the bulkhead.

That owing to the crowded condition of the slip and to the state of the tide and the necessity of making the slip under certain headway, the said fireboat *New Yorker*, without any fault on the part of those in charge of and navigating the said boat, came into collision with a barkentine lying along the northerly side of said pier 48, which your respondent, on information and belief, admits to have been the barkentine *Linda Park*.

And respondent avers that when endeavoring to make the slip as aforesaid, he found that owing to the tide *that* the said fireboat *New Yorker* would not make the bulkhead without danger of colliding with the *Linda Park*, that he immediately gave in quick succession four signals to the engine-room consisting of four gongs followed by a jingle bell, intending thereby to and as a matter of fact signaling to the engineer in charge of the fireboat *New Yorker* that as soon as might be the said fireboat *New Yorker* was to be stopped and her engines reversed full speed astern, and that, as deponent is informed and verily believes, the said signals were properly, immediately and without any delay obeyed by the engineer in charge.

Deponent avers that the said collision, or any subsequent damage resulting therefrom, was not caused or contributed to by any fault or negligence on the part of the said steam fireboat the *New Yorker*, or of the persons in charge of or navigating her, but that the said collision was unavoidable.

27 Wherefore, respondent prays that the libel herein be dismissed as against this respondent, with costs.

GEORGE L. STERLING,
Proctor for Respondent, James A. Gallagher.

SOUTHERN DISTRICT OF NEW YORK, *ss.*:

James A. Gallagher, being duly sworn, says:

That he has read the foregoing answer, and that he knows the contents thereof, and that the facts therein stated are true to his knowledge, except as to those matters which are therein alleged to be stated on information and belief and as to those matters he believes it to be true.

JAMES A. GALLAGHER.

Subscribed and sworn to before me this 11th day of December, 1893.

W. H. BRADY,
Notary Public, N. Y. Co.

(Endorsed:) Affidavit of James A. Gallagher and answer to libel. Filed Dec. 12, 1893.

28 U. S. District Court, Southern District of New York.

ROBERT W. WORKMAN, Libelant,
vs.
THE MAYOR, ALDERMEN, AND COMMONALTY OF THE CITY OF New York, The Fire Department of the City of New York, and James A. Gallagher, Respondents.

The respondent, The Fire Department of the City of New York, excepts to the sufficiency of the allegations contained in the second article of the said libel as affecting the said respondent, in this:

(*a.*) That the said libel does not allege or state in what capacity the Fire Department of the City of New York is sued.

(*b.*) That the said libel does not state whether or not the Fire Department of the City of New York is a corporation, foreign or domestic.

(*c.*) That there is no negligence charged in the said libel against the respondent, The Fire Department of the City of New York, nor is there any liability charged against the respondent, The Fire Department of the City of New York.

WILLIAM L. FINDLEY,
Proctor for The Fire Department,
No. 120 *Broadway, N. Y. City.*

(Endorsed:) Exceptions of the respondent, The Fire Department, to sufficiency of libel and notice of hearing. Filed Dec. 12, 1893.

29 At a stated term of the United States district court for the southern district of New York, held at the court-rooms in the post-office building of the city of New York, on the 27th day of December, 1893.

Present: Hon. Addison Brown, judge.

ROBERT W. WORKMAN, Libellant,
against
THE MAYOR, ALDERMEN, AND COMMONALTY OF THE CITY OF NEW YORK, The Fire Department of the City of New York, and James A. Gallagher, Respondents.

Exceptions to the sufficiency of the libel herein having been filed by the respondent, The Fire Department of the City of New York, and duly noticed for hearing, and the exceptions so filed by respondent, The Fire Department of the City of New York, coming on to be heard at a stated term of the district court of the United States for the southern district of New York, held at the court-rooms in the post-office building in the city of New York, on the 19th day of December, 1893, and after hearing James M. Ward, Esq., of counsel, in support of the said exceptions and Charles C. Burlingham, Esq., of counsel for the libellant, in opposition thereto—

Ordered, that the exceptions indicated as "*a*" and "*b*" in the exceptions as filed, be and the same are hereby allowed, and that the exception indicated "*c*" in the exceptions as filed be and the same is hereby disallowed.

30 Further ordered, that within four days after service of a copy of this order and notice of entry upon the proctor for the libellant, that the libel herein be amended by alleging in what capacity the fire department of the city of New York is sued, and that the said libel be further amended by alleging whether the fire department of the city of New York is a corporation foreign or domestic.

And further ordered, that unless the libel herein is so amended on or before January 2d, 1894, or such further time as may be allowed, that the libel as to the respondent, The Fire Department of the City of New York, be dismissed.

ADDISON BROWN.

(Endorsed:) Order sustaining exceptions. Filed Dec. 27, 1893.

31 United States District Court, Southern District of New York.

ROBERT W. WORKMAN, Libellant,
against
THE FIRE DEPARTMENT OF THE CITY OF NEW YORK, Impleaded.

The libellant hereby amends the second article of the amended libel herein by substituting for the last four lines of said article the following allegation:

That, at such times, the respondent, The Fire Department of the City of New York, which is a department of the municipal government of the city of New York, was a quasi corporation, and as such, by virtue of the statutes in such cases made and provided, particularly chapter 11 of the act known as the consolidation act (chap. 410 of the Laws of New York, 1882), had the keeping and custody of all fire apparatus and all property of whatever nature, including said

fireboat *New Yorker*, belonging to said city. At such times the respondent Gallagher was the acting master of said fireboat.

January 2, 1894.

WING, SHOUDY & PUTNAM,
Proctors for Libellant.

(Endorsed:) Amendment to amended libel. Filed January 2, 1894.

32 District Court of the United States for the Southern District of New York.

To the Honorable Addison Brown, judge of the district court for the southern district of New York:

The answer of the Fire Department of the City of New York to the libel of Robert W. Workman, and to the amended libel and the amendment to the amended libel herein, alleges as follows:

First. That the fire department is, under and by virtue of the statute in such case made and provided, to wit, under and by virtue of section 34 of chapter 410 of the Laws of 1882 and the acts amendatory thereof, one of the departments of the city of New York.

Second. That under and by virtue of the statute in such case made and provided, to wit, under and by virtue of section 40 of chapter 410 of the Laws of 1882, that the head of the fire department is a board, and that the said board consists of three persons, to be known as fire commissioners of the city of New York.

Third. That under and by virtue of the statute in such case made and provided, to wit, under and by virtue of the provisions of section 424 of chapter 410 of the Laws of 1882, the head of the said fire department, to wit, the said board of fire commissioners, are vested with and do possess and exercise fully and exclusively all powers and perform all duties incident to and pertinent to the said Fire Department of the City of New York, and that the said fire department can and does exercise its functions by and through the head of the said fire department, to wit, by and through the said board of fire commissioners, and in no other way whatsoever.

33 Fourth. The defendant, The Fire Department, and by its head, the said Board of Fire Commissioners, alleges that it is not a corporation, either foreign or domestic, or a quasi corporation, and that from the times mentioned in the said libel, and for a long time prior thereto, there was not and is not now any such corporation or quasi corporation.

Fifth. The defendant, The Fire Department of the City of New York, for further answer to the amended libel and the amendment to the said amended libel herein, alleges that it has no knowledge or information sufficient to form a belief as to any of the allegations contained in the first article of the amended libel herein, and therefore neither admits nor denies the same, but prays that the libellant may be put to such proof thereof as he may be advised.

Sixth. Except as hereinbefore denied, the respondent, The Fire

Department of the City of New York, admits the allegations contained in the second article of the libel herein, but as to the amendment to the said second article of the amended libel, it denies that it is a corporation, either foreign or domestic, or as is in the amendment of the said second article herein alleged, that it is a quasi corporation; and further alleges that at the times in the said libel mentioned, and for a long time prior thereto, there was not and is not now any such corporation or quasi corporation.

And for further answer to the libel herein, and on information and belief, the defendant, The Fire Department of the City of New York, by its head, to wit, the Board of Fire Commissioners of the City of New York, alleges the truth touching the collision in the said libel complained of to have been as follows:

That on or about the eleventh day of June last the fireboat *New Yorker*, between four and half past four in the afternoon of that day, being called thereto by telegraphic signal, left the place where she was moored, to wit, at the foot of Castle Garden, in the
34 North river, and properly officered, manned and appointed, and in charge of a skillful pilot, who was at all the times hereinafter mentioned at the wheel and diligently engaged in attending to his duties, proceeded around the Battery and up the East river, and in order safely to enter the slip between pier 48 and pier 49, East river, and reach the bulkhead to attach her hose, observing when she reached a point to the south of pier 48, that the fireboat *Havemeyer* lay along the end of pier 48, manœuvering to effect her entrance into the slip, and that along the northerly side of pier 48 was lying, from the bulkhead out, a barkentine, and from the end of the pier line, heading in towards the bulkhead, a schooner, occupying some 20 or 30 feet of the open water between the said two piers 48 and 49, and from the pier line, in along the southerly side of pier 49, lay a railroad float, occupying some 35 or 40 feet of the open water between the said two piers, and it being the duty of the fireboat *New Yorker* to proceed with all possible dispatch into said slip, and up to the bulkhead lying between said piers 48 and 49, the pilot in charge of and navigating the fireboat *New Yorker*, heading out a sufficient distance into the East river, proceeded up to a point above pier 49 and then headed down so as to make the open water between the said piers 48 and 49, and, with the tide running as it was, was compelled, in order to avoid a collision with the railroad float lying along the southerly side of pier 49, to proceed at a moderate rate of speed into the said slip, in order to keep said fireboat under control and make his proper connections at the bulkhead.

That, owing to the crowded condition of the slip and to the state of the tide and the necessity of making the slip under certain headway, the said fireboat *New Yorker*, without any fault on the part of those in charge of and navigating the said boat, came into collision with a barkentine lying along the northerly side of said pier 48, which your respondent, on information and belief, admits to have been the barkentine *Linda Park*.

And on information and belief respondent avers that the
35 said collision and any subsequent damage resulting therefrom were not caused or contributed to by any fault or negligence on the part of the steam fireboat *New Yorker* or of the persons in charge of and navigating her, but that the said collision was unavoidable on her part.

Wherefore respondent prays that the libel as against it be dismissed with costs.

WILLIAM L. FINDLEY,
Proctor for Respondents
The Fire Department of the City of New York.

CITY AND COUNTY OF NEW YORK, *ss:*

Anthony Eickhoff, being duly sworn, deposes and says: That he is the acting president of the board of fire commissioners, which said board of fire commissioners is the head of the fire department of the city of New York. That he has read the foregoing answer and knows the contents thereof, and that the same is true to his own knowledge, except the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true.

Deponent further says that the reason why this verification is not made by the respondent, The Fire Department of the City of New York, is that the fire department cannot lawfully act save only by the head of the said fire department, to wit, the board of fire commissioners.

Deponent further says that his knowledge of the matters and things set forth in the said answer is derived from the records of the fire department of the city of New York and from statements made to him by the officers and firemen selected by the said board of fire commissioners as the head of the fire department.

ANT. L. EICKHOFF.

Sworn to before me this 17th day of January, 1894.

DAVID GORHAM,
Notary Public (125), *N. Y. County.*

(Endorsed:) Answer of the Fire Department. Filed January 18, 1894.

36 United States District Court, Southern District of New York.

ROBERT W. WORKMAN
v.
THE MAYOR, ETC., OF THE CITY OF NEW YORK, The Fire Department of the City of New York, and James A. Gallagher.

Before Hon. Addison Brown, Judge.

NEW YORK, *April* 9, 1894.

Appearances.

Messrs. Wing, Shoudy & Putnam (Mr. Putnam and Mr. Burlingham, of counsel), for libelant; William H. Clark, Esq., counsel to the corporation, proctor for the Mayor, Aldermen and Commonalty of the City of New York;

Wm. L. Findlay, Esq., proctor of the Fire Department; George L. Sterling, Esq., proctor for James A. Gallagher (James M. Ward, Esq., of counsel for all respondents).

The claims of the libel and answer are stated.

WILLIAM WESTFALL, being duly sworn and examined as a witness for the libellant, testifies:

By Mr. BURLINGHAM:

Q. In June last you were watchman on the barkentine *Linda Park?*

A. The *Linda Park;* yes, sir.

Q. And in the employ of Van Hoesen Brothers then?

A. Of Van Hoesen Brothers then.

Q. You and your family were on that barkentine that night?

A. I only had my wife that afternoon on board, and my daughter.

Q. But you had been yourself in charge of her?

A. For six weeks.

37 Q. How long have you been about this port as a watchman?

A. I am with Mr. Van Hoesen a year.

Q Before that you followed the sea?

A. I followed the sea.

Q. For how many years?

A. Thirty-six years.

Q. You have been master?

A. I have been master in America, and master in England.

Q. And of large ships?

A. I have been on 800 tons in England and about 400 tons in New York.

Q. You followed the sea all the time up to the time you began to work for Van Hoesen?

A. All the time, yes, sir.

Q. What is the length of the *Linda Park?*

A. Oh, she is about 400.

Q. I am not asking her tonnage. Her length, how long is she?

A. Oh, her length. I could not exactly say what the length was, I think about 150 feet or so.
Q. What is her beam, about?
A. About 35.
Q. She was lying on the north side of pier 48, East river?
A. Pier 48, East river; yes, sir.
Q. Head out or in?
A. Head out.
Q. How near was her stern to the bulkhead?
A. Say about 15 feet.
Q. What was there ahead of her further towards the river?
A. A schooner.
Q. The other schooner lay head out or head in?
A. Head in.
Q. And how much space was there between the barkentine and the schooner?
A. Oh, there was very little space; there was, I suppose, you may say about 25 feet.

By the COURT:

Q. Did the schooner's bowsprit overrun your deck?
A. No, oh no, no, sir; there was alongside a barge when the *Havemeyer* came in, right alongside of us.

By Mr. BURLINGHAM:

Q. What kind of barge?
A. One of the railroad barges, a covered barge.
Q. Won't you tell us what you mean by 25 or 30 feet between the schooner and the barkentine; was that from stem to stem or from bowsprit to bowsprit?
38
A. You may say from stem to stem.
Q. Then didn't the bowsprits come together at all?
A. Yes, close to it.
Q. How near did the two ends of the bowsprits come?
A. I could not remember that.
Q. Jib-boom I mean?
A. I suppose you may say about five or six feet.
Q. Were there any other vessels in the slip moored?
A. There was a railroad float laying in pier 49, and the barge what was alongside of us that afternoon when the fire commenced.

By the COURT:

Q. Where was that float?
A. The float was at 49.
Q. Right opposite you?
A. On another dock; yes, sir.
Q. Right across from you?
A. Not quite.

By Mr. BURLINGHAM:

Q. Which way?

A. Just about ahead it commenced and laid more to the end of the dock.

Q. It was more abreast of the schooner than of you, was it?

A. Yes, half and half you may say.

By the COURT:

Q. Was there anything alongside of the schooner, abreast of the schooner?

A. No, sir.

Q. Which was widest, which had the most beam, the schooner or the barkentine?

A. Oh, the—it would be just the same, the railroad barges ain't very wide, 35 feet.

By Mr. BURLINGHAM:

Q. Was the schooner as much beam as your vessel, his honor asked?

A. Oh, no, the schooner was only narrow.

Q. About how much do you think?

A. About 25; only a small schooner.

Q. The barge that was alongside of the barkentine had what beam?

A. She had about 30 or 35 feet.

39 Q. And the railroad float across the slip at pier 49 was what beam should you say?

A. They have about 22 I suppose, these railroads.

Q. Was it a float over there for cars?

A. For cars to get on.

Q. One track or two tracks?

A. Two tracks.

By the COURT:

Q. Did you see the *New Yorker* come in?

A. Yes, I see the *Havemeyer* had plenty of room and so did the *New Yorker*.

By Mr. BURLINGHAM:

Q. When did the fire break out and where was it?

A. Half past five. I first stood with my wife and the mate at the captain's house when I see the smoke come off the roof and I said——

Q. What time was it?

A. Between five and six.

Q. Where was the fire?

A. In Clinton, corner Clinton and South street, the old tobacco inspection.

Q. On the other side of South street?

A. Yes, sir.

Q. Did the engines come to the fire?

A. Yes, sir.

Q. When did the *Havemeyer* come?

A. The *Havemeyer* came, she was the first fireboat that came.
Q. Where did she go?
A. With her head up the street, up to the bulkhead.

By the COURT:

Q. How far off from you as she lay there?
A. I suppose about 20 feet.
Q. That was clear?
A. Yes.
Q. Clear water between you and the barge that lay alongside of you. She was outside of the barge, of course?
A. Oh, when the *Havemeyer* came in? When the fire broke out the barge dropped down out of the fireboat's way.

By Mr. BURLINGHAM:

Q. Which way?
A. Alongside of us.
Q. Where had she been?
A. She was laying on the bulkhead; she only dropped right alongside of us.
Q. Was she near your bow or stern?
A. No, against the stern, you may say about amidship.
40 Q. How much space was there between the barge and the fireboat *Havemeyer* his honor asked you?
A. Oh, it was a good bit.
Q. How much?
A. I don't remember.
Q. Was the *Havemeyer* nearer 49 or 48?
A. The *Havemeyer*, she was right in the middle.
Q. Middle of what, the space?
A. Of the slip, yes, sir.

By the COURT:

Q. Did the stern of the *Havemeyer* lap the barge?
A. No, sir.
Q. It did-'t lap the barge?
A. No, sir. There was plenty of room; and the *New Yorker* came inside of the *Havemeyer*, between the barge and the *Havemeyer*, she lay more to 49 slip.
Q. Did she lie up and down the slip just like the wharf, the way they run in there?
A. Yes, sir.

By Mr. BURLINGHAM:

Q. With her head to the bulkhead?
A. With her head to the bulkhead.
Q. Did the stern of the *Havemeyer* overrun the line of the barge at all?
A. No; more to pier 49.

By Mr. PUTNAM:

Q. How far was it from the stern of your barge back to the bulkhead?

A. About 18 feet.

Q. Then the side of the first fireboat, *Havemeyer*, did lap the quarter and side of the bark?

A. Yes.

Q. And after the *Havemeyer* came there, there was a scow between the side of the *Havemeyer* and the side of the bark?

A. Yes.

Q. Can you tell about how much water there was between the scow alongside of the bark and the *Havemeyer*, how much open water?

A. Oh, there was about 40 feet or more—50.

Q. Do you think the *Havemeyer* was about in the middle of the open slip, or nearer one pier or the other?

A. More to 49.

41 Q. Did the *Havemeyer* remain in about the same position after she got there until the collision?

A. Yes, sir.

Q. How long after the *Havemeyer* got there was it that you first saw the fireboat *New Yorker?*

A. About 20 minutes afterwards.

Q. When you saw the *New Yorker* first where was she?

A. She was on pier 49, forward on the bulkhead.

Q. That is, the outer end of the pier?

A. She struck the outer end of pier 49, when I sung out right away to the mate, "Look at that bloody fool."

Q. When you first saw the fireboat had she come down the river or up the river?

A. She came going up the river—going north.

Q. I mean the *New Yorker.*

A. Yes.

Q. And she struck her bow against the outer end of pier 49?

A. Against the outer end of pier 49.

Q. That is the time you first saw her?

A. That is the time I first saw her.

Q. Did you watch her from that time?

A. Yes.

Q. Watched her close?

A. Yes.

Q. And how did she clear the pier?

A. She had difficulty to back out again to enter the slip, and when she entered the slip she was all right; she backed out and came up to the slip.

Q. When she got into the slip then how was she heading the second time?

A. She headed right enough until her nose turned towards us; right straight up the slip she headed.

Q. Did you see anybody in the pilot-house of the fireboat?

A. I see somebody there leave the wheel, and the wheel spinned around, at the time she came up right away up to us and struck us ahead.

Q. When you say you saw somebody leave the wheel where did they go that you saw?

A. Only talking to somebody on the edge of the house.

Q. Did he come out of the pilot-house?

A. Yes, sir.

Q. Which side?

A. On the port side; on our side; it was the port side.

Q. Do you know who it was?

A. No, sir.

42 By the COURT:

Q. Do you mean the wheelsman?

A. The man that had charge of the wheel spoke to the engineer or somebody.

By Mr. PUTNAM:

Q. How far away was the New Yorker at the time?

—. ——.

By the COURT:

Q. Where was the engineer? You said spoke to the engineer.

A. He stepped right against the engine-house aft of the high house—it is a high deck and the engineer is underneath of it; and I see him come out and talking to him, and the wheel spinned around and the head got right into us.

Q. Did he go away from the door of the pilot-house in order to speak to the engineer?

A. That is what I see.

Q. How far away from the door did he go?

A. Just from *here* to *there*.

Q. Three or four feet?

A. Yes.

By Mr. PUTNAM:

Q. Did you see the engineer at all at the time?

A. No, sir.

Q. But you thought he was speaking to the engineer?

A. I did not see the engineer at all, but that is what my opinion was, that he gave some words to the engineer.

Q. How far away was this fireboat at the time you first saw the door open and the man come out of the pilot-house?

A. She was mostly right up to us; she was, I suppose, about—you may say she was off about 30 or 40 feet.

Q. Very near?

A. Yes, sir.

Q. Could you see the spokes of the wheel?

A. Yes, sir; plain; and I stood on the rail, on our rail, and see everything.

Q. What did you see of the steering wheel?
A. I see it spin around, the wheel.
Q. Could you say which way, or couldn't you tell that?
43 A. When you let go a ship's wheel it is bound to spin one way and come back another way with the currents and the tide there.
Q. Could you see which way the wheel did spin around or didn't you notice?
A. No, I did not take notice of that.
Q. Did you see any change in the heading of the fireboat?
A. Yes, sir, certainly.
Q. Which way?
A. Heading against us; come right on top of us.
Q. How did the fireboat strike the bark?
A. Struck right underneath the bowsprit; lifted the bowsprit right about four inches off the foremast.

By the COURT:

Q. What of the fireboat struck?
A. Went right underneath our iron bowsprit.
Q. What part of the fireboat struck you?
A. The head, her head—the foremost part.
Q. Do you mean the stem?
A. I mean the stem went right through to the bulkhead; left there a mark on the bulkhead; so he had a big force on him.
Q. Are you talking about the bulkhead or pier—which do you mean?
A. On the bulkhead on the dock. She broke all our hawser, a steel hawser, too; we had three parts of the steel hawser out on one side and on the other side two.
Q. Was it your stem or stern the fireboat ran against?
A. The stem.

By Mr. PUTNAM:

Q. You don't mean the bulkhead—you mean the side of the wharf, don't you?
A. Yes, the bulkhead on the wharf.
Q. We mean by "bulkhead" the end towards the street. You don't mean that?
A. No, the dock. The mark is to be seen today when you go down there.

By the COURT:

Q. Did she strike your stem or not?
A. No; right underneath the bowsprit, the gear.
44 Q. She didn't strike your stem?
A. No, sir; only carried away the gear and lifted the bowsprit right up.
Q. The martingale, and so on, were carried away?
A. Yes, sir; that was all gone.

By Mr. PUTNAM:

Q. About what angle did she strike; how many points; can you tell that?

A. Yes, you may say about six or seven points. A boat coming up that way, and a vessel laying alongside of the dock and coming that way right into us, I suppose about five points it would have to be, or six points.

Q. How was the vessel loaded, as to being light or deep?

A. No, sir, the vessel was just ready for sea.

Q. She was fully loaded?

A. Yes, sir; that is my last night; that is the reason I brought my wife and daughter on board; the hatches were battened down.

Q. Do you know how high up the bowsprit was, where it goes into the knightheads, above the water?

A. Above the water? You may take it for 13 or 14 feet.

Q. That is the part of the bowsprit that goes into the hull of the vessel?

A. Yes, from the water edge.

Q. Was there anybody else on board the barkentine at the time except you?

A. Oh, there was my wife and my daughter and the mate, second mate, and we were all standing on the poop.

Q. Were any of the crew there?

A. The crew were all on board.

By the COURT:

Q. What did it do when it ran underneath your bowsprit?

A. We run right away and took another hawser.

Q. What was the effect, the running under; you said it carried away the gear, martingale and so on; what else did it do?

A. The hawser of the ship was fast, the steel hawser.

Q. What other damage did the fireboat do by running in under your bowsprit?

A. I could not say.

Q. Did it hurt the bowsprit any?

45 A. Yes, sir. When the surveyor come on board he told the captain right away he could not go to sea, as he had to be repaired and get a new bowsprit; the bowsprit was all crooked and split; it was an iron bowsprit.

By Mr. PUTNAM:

Q. What was the hull of this vessel, wood or iron?

A. Iron.

Q. You say the hawsers were carried away too?

A. Yes.

Q. How many hawsers were carried away or parted?

A. There was one or two; we had two or three parts out of the steel hawser and one we had in three parts out and another one we had in two parts out.

Q. The forward hawsers were damaged, were they?

A. Yes, sir.
Q. How much?
A. Two or three places were cut.
Q. Cut into?
A. Yes, sir.
Q. How was the blow, as to the sound of the blow, when it struck?
A. Oh, it was a terrible blow, I thought the foremast and all would come down.
Q. How did the fireboat go away after the collision?
A. She had to back out the best she could do.
Q. How did she back clear?
A. She back- clear nice and good enough.
Q. And where did she go then?
A. She went right alongside of the *Havemeyer* and put out a hawser.
Q. Towards the bulkhead?
A. Yes; went right alongside of the *Havemeyer*.

By the COURT:

Q. Which side of the *Havemeyer* did she go—towards you?
A. Yes; towards 48—the *Havemeyer*.

By Mr. PUTNAM:

Q. After the *Havemeyer* got in there did the captain come on board your vessel?
A. No; not from the *Havemeyer*, but from the *New Yorker* the captain, what had charge of the wheel, he came on board and told me——
Q. Wait a moment. When was that—how long after the collision was that?
A. I could not remember; he come right away.
46 Q. It was after the fireboat got in?
A. He told me and the mate he gave the signal to the engineer and it was the engineer's fault.
Q. Did you hear any talk by the mate to him at the time?
A. Yes, sir; I stood right alongside.
Q. What did the mate say?
A. The mate told him it couldn't be helped now, "You have to pay;" the mate told him right away there was nobody in the wheel-house, but I did see a man in the wheel-house and I see him coming out. She pointed right enough up the slip.
Q. Did he make any answer, when the mate made the remark, whether there was anybody in the wheel-house or not?
A. He said the fire department would pay that.
Q. Did he say anything whether they came out of the wheel-house or not?
A. Oh, he said he was inside.
Q. If he had kept the course he was on before he came out of the wheel-house would there have been any accident?
A. All right; no sir.

Counsel for respondents object to the answer. Objection overruled.

A. (continued). That was a flood tide, and surely on the flood tide a vessel coming in, she had to be swept on the other side against the tide. It was flood tide when it happened, and strong tide too at the same time, and she struck the float on 49 before she came on the other side. It was only poor management, anybody can know that very well what see it.

Q. You think that the flood tide set up towards 49?

A. Certainly.

Q. Was there room enough for the fireboat to come in on the upper side of the slip instead of coming down on the side of 48?

A. Yes, sir; there was nothing there only the float.

Q. That is the float you said was for two cars, double track?

A. Laying on pier 49, the float.

Q. About what time in the day did this accident happen?

A. Between five and six; I couldn't exactly say.

47 Q. Broad daylight was it still?

A. Daylight, summer time.

Q. Fine weather?

A. Fine weather, beautiful day; that is the reason I took my wife and daughter on board of the ship.

Q. Was there any wind at the time?

A. There was a little easterly wind I suppose.

Q. Light wind?

A. Yes, not much, moderate wind.

Cross-examined by counsel for respondents:

By Mr. WARD:

Q. Have you done any navigating around the harbor of New York?

A. Yes, sir.

Q. Are you familiar with the tides around the harbor of New York?

A. Yes. I have been three years captain of the National Steamship's vessel, that I know the tides.

Q. Have you ever lain in this slip before, 48 and 49?

A. No, sir.

Q. Do you know whether or not there are any eddies that set in there?

A. I couldn't swear to it.

Q. That you don't know anything about?

A. No, sir. I never lay on that pier before.

Q. In what capacity did you say you were employed on the barkentine?

A. Watchman.

Q. Were you there all day?

A. No, sir.

Q. When did you come on?

A. I came about three o'clock with my wife and daughter.
Q. What hours were you aboard of that boat, supposed to be?
A. Six to six.
Q. What time did you usally go aboard the boat?
A. Generally I get my tea about five o'clock and I leave——
Q. But this afternoon you say you went aboard at three o'clock?
A. Three o'clock with my daughter and wife, to show the vessel.
Q. Did your daughter and wife stay aboard the barkentine with you?
A. The time it happened; they can't tell any more than I can tell by my remembrance. Yes, when the *action* happened they were just on the rail; I tried to put them ashore.
48 Q. Who else was aboard the boat at the time of the accident?
A. All the crew, only the captain; the second mate and mate was talking to my wife and daughter.
Q. And you say you were aboard there when the captain of the *New Yorker* came aboard?
A. Yes; stood right alongside.
Q. And had the conversation with the mate?
A. Yes; stood right alongside of him.
Q. Do you see him here?
A. Yes, sir.
Q. Which one?
A. That one.
Q. Sitting there in uniform?
A. Yes, sir.
Q. Which one of the men in uniform?
A. With the light moustache.
Q. When did he come aboard?
A. When the boat commenced to play the hose.
Q. That is the very afternoon of the accident?
A. Yes, sir; the same, just right away.
Q. Where were you on the 23d day of June, 1883?
A. Oh, I couldn't say that.
Q. Were you in New York?
A. I have been in New York all the time; I only—that June I moved to Brooklyn; I live at 53d street.
Q. Do you know there was testimony taken in this case?
A. No, sir; never.
Q. I didn't ask you whether you were examined. Do you know that some of the people on board that boat on the day of the accident have been examined about this collision?
A. No, sir.
Q. You don't know that?
A. No, sir. I went to the head chief, Mr. Croker, and told him the same day of the fire; he said, "Let the captain come up to-morrow."
Q. Have you had the testimony, any testimony in this case, read to you before you testified?
A. No, sir; never knew nothing about it.

Q. Were you aboard the boat when the *Havemeyer* came in?
A. Yes, sir.
Q. What direction did she come from?
A. From the north.
Q. That is from above pier 49?
A. Yes, sir.
49 Q. That is the first of the fireboats, is it?
A. Yes, sir, that is the first came in.
Q. When did you first see the *New Yorker*?
A. See the *New Yorker* when she got afoul on pier 49 on the bulkhead; she come right with the float up and got afoul just on the corner, on the edge of 49.
Q. Where were you standing then?
A. On the poop.
Q. Did you keep your eye on the *New Yorker* from that time?
A. Yes, sir; and watching her coming in and long time before he got clear of the corner.
Q. How long did it take him to get clear of the corner?
A. I could not say how long it took him. It is no use a man saying——
Q. You don't know, then?
A. No.
Q. How did he strike the corner as he came up the river? Was he head on up the river when he struck the corner?
A. Yes, sir.
Q. Wasn't trying to come in the slip?
A. Whether he was full speed or not, he got afoul on the corner.
Q. On that diagram I show you, where do you say the *New Yorker* struck pier 49?
A. *Here*; right *there*.
Q. *There* is pier 49.
A. You have got it another way. I lay at 48, *here*. She struck right *here* on the corner.
Q. She struck head on?
A. Yes.
Q. Sure of that?
A. Yes; and tried to get clear there first. That is when we first took notice of her. Then she come right enough in about *here* and come right in *there*, where we lay, underneath our bowsprit (indicating the southeast corner of 49).
Q. Do you know anything about steering gear?
A. I have been quartermaster of the navy long enough to steer.
Q. Do you know the difference between the wheels steered by hand and the steam steering gear?
A. I had to know it.
Q. Don't you know that a steam wheel won't revolve if you let it alone?
A. I don't know anything about the steam steering. I
50 must not say I know anything about the new fashion by steam steering. I don't know anything about that.

Q. But you said you saw the wheel in the pilot-house revolve around.

A. Revolve around, yes. I swear to that.

Q. On which side of the pilot-house was the door that you say he came out of?

A. On the port side, on our side.

Q. Did you look at the house closely enough to know how many doors there are to it?

A. No, sir.

Q. You only know there is a door on the port side?

A. I only see him come out.

Q. Of the door on the port side?

A. He came out on that side anyway, on the port side.

Q. Out of the pilot-house?

A. Yes, sir.

Q. You say he left the wheel?

A. I see him talking like that over—I thought it was to the engineer—and before he got around to the wheel to hold fast the wheel the boat was right underneath our bowsprit.

Q. What I want to know is what side of the pilot-house you saw him come out of?

A. I could not exactly say. I will commit no wrongness. It is nothing to me—I am pretty old and my remembrance is getting short—but I see him anyway; the mate said right away he was not in the wheel-house, and all to me, and "yes," I said——

Q. Did you see him coming out of the pilot-house at all?

A. Yes, sir; I did see him coming out.

Q. Didn't you say on your direct examination you saw him come out of a door on the port side of the pilot-house?

A. I won't say port side, but I see him come out of the pilot-house and talking to somebody off the little house, and before he got back again the wheel spinned around and the vessel hit underneath the bowsprit. It was bad management, that is all.

Q. Didn't you say on your direct examination you saw him come out of the door on the port side of the pilot-house?

A. I don't know if the port side.

Q. You don't know where he came out, do you?

A. He came out of the wheel-house; I will not swear what door.

51 Q. How many wheels are there in the pilot-house; how many steering wheels are there in the pilot-house of the fireboat *New Yorker?*

A. How many steering wheels are there in the pilot-house of the fireboat *New Yorker?* It is a double wheel, is it not, or a single wheel?

Q. Which is it?

A. Single wheel, I believe; I could not say; I will not commit no wrongness against the city. I call myself an American; but city or foreign vessels, I only say what is right and what I do know for sure.

Counsel for respondent- moves to strike out the last part of the answer.

Q. (repeated). How many steering wheels are there in the pilot-house of the fireboat *New Yorker?*

A. I didn't take notice. I see the wheel spinning around, and it was only one wheel.

Q. The railroad float lying along pier 49 was flush up, her stern with the pier line?

A. They have no stern and no head to it—a railroad float. There was plenty of room there.

A. I didn't ask that. I move to strike it out.

A. There was plenty of room for a big vessel; a 4,000 ton ship could get up there.

Counsel for respondent- moves to strike out the answer. Motion granted.

Q. The railroad float lying along pier 49 was flush up, her stern with the pier line?

A. Yes. She lay in the middle of the dock.

The COURT: He doesn't understand these things.

By the COURT:

Q. Counsel means to ask if the outer end of the float extended out as far as the outer line of the pier.

A. No.

By Mr. WARD:

Q. Where was she lying in the pier?

A. In the middle of the dock.

Q. Which dock?

A. Pier 49; in the middle of the dock.

52 Q. She lay about opposite your barkentine?

A. Just right half of our vessel and the schooner, just about the half. It was strong tide, the tide was pretty strong—there is no use talking—while the fireboat *New Yorker* had a job to clear that corner of 49; the tide run pretty strong.

Q. Did you see the *Havemeyer* come up the river or come down?

A. Come down the river.

Q. What did she do to get into the slip?

A. Nothing; only went right in and took the hose out, plenty of room; then the barge what was there in the road got frightened, I suppose, and she hauled away between me and the bulkhead, the stern of our vessel on the bulkhead; she hauled right alongside of it.

Counsel for respondents move to strike out the answer.

Q. What did she do to get into the slip?

A. Went right in the slip.

Q. What did the *New Yorker* do after you say she ran afoul of pier 49 before she got into the slip?

A. She straightened up and came straight in the slip.
Q. What do you mean by straightening up?
A. To clear her.
Q. Did she back away from the dock?
A. Certainly.
Q. Did she back out into the stream?
A. Yes, sir.
Q. Was she above or below pier 49?
A. She was only kind of just at the corner of 49 she — struck.
Q. At any time before she got into the slip did she get above pier 49?

Mr. PUTNAM: You mean further up the river towards Grand street?
Mr. WARD: Yes.

A. No, sir. Only just she struck and when she got clear of 49 she steered her course right in the middle of the slip.
Q. Then she came in straight into the middle of the slip?
A. Yes, sir.
Q. This fire was actually blazing, wasn't it?
53 A. Only just commenced. I was the first man ever see the smoke off the roof.
Q. Where were you?
A. I stood on the quarter-deck with my wife and daughter and the mate and second mate.
Q. On the quarter-deck?
A. Yes, sir.

By Mr. PUTNAM:

Q. How long had the fire been burning, or how long was it after you saw it before this accident?
A. I suppose about—I don't remember exactly. I know the *Havemeyer* was quick enough there; the *Havemeyer* was there, I think, in 15 or 20 minutes; and it was, I suppose, about half an hour before the *New Yorker* came, but I will not swear to that, I don't remember that.

Counsel for libellant offers in evidence the depositions of the following witnesses, taken by stipulation June 23d, 1893:
Peter Brown, first officer of the barkentine *Linda Park*.
George Parkerson, second officer.
Thomas Skinner, captain.

Mr. PUTNAM: I call your honor's attention especially to the fact that Thomas Skinner, the captain, was asked if he could comply with Mr. Ward's request to appear on the 6th of July and he said he could not.
Mr. WARD: Your honor, I supposed that testimony is admitted subject to the objections to be raised?
The COURT: Yes.

Libellant rests.

54 *Respondents' Case.*

Counsel for respondents offer in evidence the stipulation under which the testimony was taken.

It is marked Respondents' Exhibit A, April 9, 1894.

Counsel for respondents also offer in evidence section 34 of chapter 410 of the Laws of 1882.

Also sections 123, 423, 430, 431, 438, and a portion of section 440.

Counsel for respondents move to dismiss the libel as to the fire department, upon the ground that no evidence has been offered to show as plead that the fire department is a corporation or quasi-corporation, and that such fact is distinctly put in issue in the answer.

They also move to dismiss the libel as to the city, upon the ground that the city is not liable for the acts of the fire department.

GEORGE W. ERB, being duly sworn and examined as a witness for the respondents, testifies:

By Mr. WARD:

Q. Are you employed by the city?

A. Yes, sir.

Q. And you were employed by the city in June, July and August, 1893?

A. Yes, sir.

Q. In what department of the city government are you employed?

A. Foreman and captain of the fireboat *Havemeyer;* synonymous terms.

Q. What do you call the fireboat *Havemeyer*, what is she known as?

A. Engine company No. 43.

Q. When you speak of being captain, do you speak of being captain of the engine company or fireboat?

A. Captain of the company.

Q. You are not a pilot?

A. No, sir.

Q. And it is simply in reference to the machinery of the boat as a fireboat engine that you speak of being captain?

A. Yes.

55 Q. What are your duties as captain, what relation do you bear to the crew of the *Havemeyer*?

A. I am the superior officer of the *Havemeyer*.

Q. You give the orders as to what is to be done with the boat, and so on?

A. Yes, sir.

Q. Were you in command of that boat on Sunday, June 11?

A. Yes.

Q. Where were you lying that day?

A. Foot of Grand street.

Q. Did you get a call to a fire about two or three or four o'clock that afternoon?
A. Yes, sir.
Q. Where was the fire?
A. Foot of Clinton street, East river.
Q. Did you come down on the boat?
A. Yes, sir.
Q. What time was that?
A. 4.30, I think, as near as I can remember, about 4.30.
Q. Where was the fire; at the foot of Clinton street?
A. Yes, sir.
Q. Where is that?
A. That is right on the corner of Clinton street, right at the head of the bulkhead.
Mr. PUTNAM: Head of which pier?
Mr. WARD: Pier 48.
Q. Was there any other fireboat in the slip when you got there?
A. No, sir.
Q. Were there any other boats in the slip?
A. Yes.
Q. Is your recollection clear today what boats were there?
A. At the end of pier 49 there was a railroad float.
Q. Is your recollection clear?
A. Very clear; yes, sir.
Q. You say that there was a railroad float at the end of the pier?
A. 49.

By the COURT:

Q. You don't mean across the end?
A. No, sir; I mean laying up against the side of the pier, inside, in the slip.

By Mr. WARD:

Q. How was she lying at the end of the pier; mean to say with one end of the railroad float flush with the pier line, or not?
56 A. I don't think it was exactly flush, I think there was a space probably four or five feet.
Q. Was there anything else lying in the slip?
A. Yes, sir; at the stern of the float there was a lighter.
Q. On that pier 49?
A. On that pier 49; yes, sir.
Q. Was there anything else alongside of pier 49?
A. No, sir.
Q. Was there anything in the slip along pier 48?

By the COURT:

Q. Was that lighter lying up against the side of the pier?
A. Yes, sir.
Q. Right astern of the float?
A. Right astern of the float; yes, sir.

Q. Wider or narrower than the float?
A. Oh, she was some narrower than the float I should judge.

By Mr. WARD:

Q. How wide do you think the railroad float was?
A. On a rough calculation I should say at least 40 feet, 35 or 40.
Q. And how wide was the lighter?
A. I should judge about 30.
Q. Then the lighter wasn't wider than the float?
A. No, sir.
Q. Were there any other boats in the slip?
A. Up against 48 there was a schooner.
Q. How was she lying?
A. She was lying very near the end.
Q. And facing out?
A. Facing out.
Q. Do you mean facing out?
A. I mean facing out towards the river.
Q. And anything else lying there?
A. The bark.
Q. How were those two boats lying with reference to each other, the barkentine and the schooner?
A. After the accident I saw the *Linda Park* and her bowspirt was over the schooner.
Q. How was the schooner's bowspirt?
A. It was out near the end of the dock.
Q. When you went into the slip where did you go, where did you take your boat?
A. Right up to the bulkhead.
57 Q. On the bulkhead nearer Clinton street?
A. Nearer Clinton street than the other because our stern was over against the float.

By Mr. PUTNAM:

Q. Which float do you mean?
A. I mean the railroad float.

By Mr. WARD:

Q. So you were lying catte-cornered at the end of the slip?
A. Yes. If you will allow me to explain I will tell you why I am so positive of that. Will that be satisfactory?
Q. You can explain. You are positive of that fact?
A. Yes, sir.

By the COURT:

Q. Your stern rested against the railroad float?
A. Yes, sir.
Q. Not against the lighter?
A. No, sir; and our quarter was up against the slip, laying catte-cornered, our starboard corner.
Q. Where was the lighter you spoke of?

A. The lighter I spoke of was behind the float, up against the slip; she wasn't as long as us.

Q. And your quarter went in between the lighter and the float?

A. No, sir; went up against the float; the float extended out from the lighter.

Q. I thought you said your quarter went up against the wharf, the pier?

A. Our forequarter.

Q. Which, the starboard quarter?

A. The starboard quarter went up against the slip in the bulkhead.

Q. By "quarter" you mean the forward part?

A. Yes, sir.

Q. Against the bulkhead, not against the side of the wharf?

A. No, sir; against the bulkhead.

By Mr. WARD:

Q. When you got in there the fire was raging; was it blazing?

A. Yes, sir.

Q. You attached your hose to what?

A. To the connection on the boat.

58 Q. And drew your water out of the slip?

A. Yes, sir; out of the water.

Q. Were you there when the *New Yorker* came in?

A. I was ashore when the *New Yorker* came in.

Q. Did you see her come in?

A. No, sir; I didn't see her until I heard the crash.

Q. While you were there did the *New Yorker* commence to play on the fire?

A. Afterwards? Oh, yes, sir.

By the COURT:

Q. She of course came in on your port side?

A. Yes, sir.

By Mr. WARD:

Q. How long is the *Havemeyer?*

A. 107 feet over all.

Q. Is she larger or smaller than the *New Yorker?*

A. Smaller.

Q. Do you know what the size of the *New Yorker* is?

A. From what I have heard she is about 120 or 126.

Q. What is the beam of the *Havemeyer?*

A. 22 feet.

Q. When you go to a fire who gives all the orders?

A. The captain of the boat, the foreman.

Q. Where the boat is to go, and how she is to go, and so on?

A. Yes, sir.

Q. But you have nothing to do with the navigation?

A. No, sir.

Cross-examined by counsel for libellant.

By Mr. PUTNAM:

Q. Who remained on your boat in charge of her after you went ashore?
A. The engineer and pilot.
Q. Who was the pilot?
A. Patrick K. Roche.
Q. And he is the man that had charge of the navigation?
A. Yes, sir.
Q. All the way down?
A. Yes, sir.
Q. When you lay in the slip which was nearest, which part of the boat was nearest to pier 48, your bow or stern?
A. My bow, the bow of the boat.
59 Q. That is what you mean by lying cattle-cornered?
A. Yes, sir.
Q. When your stern was lying up towards 49 it went inside of the line of the railroad float, didn't it?
A. No, sir; on the outside of it.
Q. And didn't go astern of the float?
A. No, sir; it went up against the side of the float.

By the COURT:

Q. Your stern starboard quarter lay against the side of the float?
A. Yes, sir.

By Mr. PUTNAM:

Q. That is the width of the float away from pier 49?
A. Yes, sir.
Q. Right up hard against it?
A. Yes, sir.
Q. Did you make a line fast or did the tide hold her there?
A. We made a line fast when we got in.

PATRICK K. ROCHE, being duly sworn and examined as a witness for the respondents, testifies:

By Mr. WARD:

Q. Are you in the employ of the city?
A. Yes, sir.
Q. And have been for how long?
A. Seven years.
Q. In what department?
A. As pilot.
Q. Of what department?
A. Pilot of the *Havemeyer*.
Q. And she is a fire department boat?
A. Yes, sir.
Q. On Sunday, June 11, 1893, were you aboard of the *Havemeyer*?
A. Yes, sir.

Q. As pilot?
A. Yes, sir.
Q. Where were you about three o'clock that afternoon?
A. On the boat.
Q. Did you come down from Grand street?
A. Yes.
Q. State how you came down the river and how you got into the slip.
A. The tide was running flood; we came down in along the docks.
60 Q. In along the docks; what for?
A. To get as much slack water as I could.
Q. What was the object of that?
A. To save as much time as I possibly could in getting to the fire.
Q. When you got to the pier, to the scene of the fire, which was between piers 48 and 49, how did you go into the slip?
A. I run up to see how the slip was open, to see if it was open far enough—there was great deal of room—and I pointed my bow in and sent her ahead.
Q. And then went in?
A. And then went in, stopped and went back, and went ahead again to go as fast as I could get in. The fire was raging very high, and when I got within a few feet I stopped and went back.
Q. Are you familiar with the waters in the harbor of New York?
A. Yes, sir.
Q. When the tide is running flood as it was that afternoon, what is the fact as to any eddies and the strength of them, and the direction of them, in the slip between piers 48 and 49?
A. The tide, flood tide, sets across from Brooklyn shore all the way up on the New York shore and there is a tendency of an ebb tide eddy inside of the docks. Over on the outside of the docks the tide runs very true ebb, or at least flood; there is a slight eddy on the inside on an ebb tide.
Q. What would be the effect of that eddy you speak of, to set a boat down?
A. To set the bow down and stern up; that is the tendency.
Q. You mean on the tide as it was running that afternoon?
A. Yes.
Q. Supposing you had been coming up with the tide and you had to make an entrance into that slip, under the conditions that existed that afternoon, how would you have made that?
A. I would have rounded to and went in full speed and stopped and went back just as soon as my nose entered the slip. Under the circumstances, where I was needed to go there in such a hurry, I would get there as quick as possible, because the fire was raging very high.
61 Q. Do you remember what was in the slip that afternoon?
A. I do, yes, sir.
Q. Have you heard the testimony of the other witnesses?
A. Yes, sir.
Q. Did you hear the testimony of the last witness?
A. Yes.

Q. Did he substantially correctly describe the situation there?
A. Yes, sir.
Q. Do you know how wide that railroad float is?
A. I judge that railroad float is from 40 to 50 feet wide.
Q. Do you know how wide the schooner was?
A. The schooner down at the end of the dock was a light-drafted schooner loaded with hay; she was in the neighborhood of 30 or 35 feet wide I should judge.
Q. How were the railroad float and the schooner lying with reference to the entrance of the slip, near the end of these piers?
A. Yes, sir.
Q. Did you see the *New Yorker* coming that afternoon?
A. I did not.
Q. Why not?
A. Because I was taking care of my own boat at the bulkhead; I had my head out there trying to arrange to give them room to come in after me, I knew they would be there and we would lap on there; and in the mean time the men were all helping to get hose and we had to lie still.
Q. Is the steering gear on the *Havemeyer* steam or hand gear?
A. The steering gear on the *New Yorker* is steam and on the *Havemeyer* by hand.
Q. If the steam steering gear——

Objected to that the witness was not steering the *New Yorker*.

By the COURT:

Q. Have you steered the *New Yorker?*
A. Yes, sir, at one time.

The COURT: He may testify if he has handled it.

By Mr. WARD:

Q. The steering gear of the *New Yorker* is steam, isn't it?
A. Yes, sir.
62 Q. Do you know how this wheel works?
A. Yes, sir. I have steered her once.
Q. With the steering gear on the *New Yorker*, if you leave the wheel alone what will happen?
A. At the time before she was accepted by this department I took a trip in her to Jersey and handled her at the coal dock, and I did leave the steering gear as it was, and went aft and I stayed back there, and it stayed the same. It wouldn't revolve without you touch the small wheel to make it.
Q. Then the steering gear in the *New Yorker* won't operate without steam?
A. At the present time, counsellor, I don't know.
Q. Who gives directions about going to the dock when you go to these fires?
A. From the time we get a station the foreman of the company designates us where to go and we go there as near as we can where he orders us to go; whether we land at the pier or bulkhead it is

optional with him. If he tells me to go to the bulkhead it is my duty to do it and he takes all the risk to do so. We do the best we can to get in there.

Cross-examined by counsel for libellant.

By Mr. PUTNAM:

Q. When did you steer the *New Yorker?*
A. I don't know exactly when, but it was before she was accepted by the fire department.
Q. How many years ago?
A. I should judge three or four years ago.
Q. That was the only occasion?
A. That was the only occasion.

Counsel for respondents offer in evidence a certified copy of the appointment of Mr. Ryan as foreman of engine No. 39.
It is marked Respondents' Exhibit B.

63 PATRICK F. RYAN, being duly sworn and examined as a witness for the respondents, testifies:

By Mr. WARD:

Q. Are you in the employ of the city?
A. Yes.
Q. In what capacity?
A. Foreman of engine company 57.
Q. What is that company 57?
A. The fireboat *New Yorker.*
Q. Did you hold that same rank and perform those same duties in June, 1893?
A. Yes, sir; June 11.
Q. You left the Battery that afternoon with the *New Yorker* to attend the fire, didn't you?
A. Yes, sir.
Q. Will you state what happened from the time you left the Battery up to the time of this alleged collision, as far as you know?
A. We received the alarm at 3.30 or 4.30 I am not sure which; we come up the East river; we see the fire burning between piers 48 and 49 on the corner of Clinton and South streets; I ordered the fireman to go into the slip between both piers, 48 and 49.
Q. Why did you order him to do that?
A. It was necessary for us to go up near the fire to do work, or otherwise it would be no use to go there.
Q. The fire was actually under way, was it?
A. The fire was actually under way and coming out through the roof of the storehouse.
Q. Before you got into the slip did the *New Yorker* come into collision with any pier, bulkhead or anything else?
A. No, sir.
Q. When you got up there who was in the pilot-house?
A. Pilot James A. Gallagher.

Q. Do you know whether or not he was in that pilot-house continuously?

A. I do.

Q. Do you know what was done with the *New Yorker* when she got up there to the slip; was the *Havemeyer* already in the slip?

A. The *Havemeyer* was going in the slip as we got opposite the slip.

Q. Where was the *Havemeyer* when she was going into the slip when you saw her, pier 48 or 49?

64 A. No; she was near pier 48; that is, drifted more on the side of 48, the *Havemeyer* going up in the slip as we got to the slip.

Q. What did you do under those circumstances?

A. The *New Yorker*, she rounded-to, going up with the tide little above 49, so as to swing her stern to clear the float which was lying on the south side of pier 49.

Q. That is the railroad float?

A. That is the railroad float, yes, sir.

Q. How near the end of the dock was that railroad float lying?

A. I would judge, as far as my recollection goes, about five feet; it might be eight feet.

Q. Do you know how wide she is?

A. I judge she was about 40 feet wide. She was one of those double floats.

Q. There was a schooner on the other side of pier 48?

A. Yes, sir.

Q Are you able to state how much clear water there was there between the railroad float and the schooner?

A. I couldn't say, but somewhere about 55 feet.

Q. What happened after that as you went into the slip?

A. I stood on the after part of the *New Yorker*, knowing we would have a pretty tight job to clear the float; I stood there myself with a soft fender—it stood just about the height of our waist; if it struck our waist it would have carried it in. I heard the pilot give four bells, and knowing the engine was about to back I stood there with this soft fender thinking as she backed down she would strike the float, but it cleared the float by about six inches. The headway was so much at the time that it carried the bow of the *New Yorker* under the *Linda Park's* bowsprit—that is, together with the eddy inside of the slip.

Q. Do you know anything about the eddy in that slip?

A. Only what I have seen that day. I am not very well conversant with it; I am some.

Q. Could the *New Yorker* have remained outside of that slip and been of any service in putting out the fire?

A. No, sir.

65 Q. Did you go aboard the barkentine at any time?

A. Yes, sir.

Q. When?

A. It must have been after eight o'clock—that was on the 11th of June; it was dark when I went on board of her, and that is why I

say it must been after eight o'clock. It was too dark for me to make investigation of what damage was done.

Q. Whom did you see when you went aboard?

A. I saw no one.

Q. Didn't you have any conversation with anybody?

A. No, sir.

Q. Have you ever seen that witness who was on the stand before today?

A. No, sir.

Q. When you went aboard you say you saw no one?

A. No, sir.

Q. Then you made no statement to any one?

A. No, sir. It was impossible for me to go aboard before that time.

Q. Did you send anybody aboard before that?

A. No, sir.

Q. Do you know whether anybody who was aboard the *New Yorker* did go aboard the barkentine?

A. No, sir; I do not.

Q. That you don't know?

A. No, sir.

Q. I understood you to say you heard the bells given to the engineer from the pilot-house?

A. Yes, sir.

Q. And how many bells?

A. Four bells.

Q. Are you familiar enough with the bells to know what they meant?

A. Yes.

Q. What did they mean?

A. In this case it was four bells and a jingle, that means she was going ahead under one bell and a jingle, that required four bells to back her, and the jingle to back her hard.

By the COURT:

Q. When those were given where was your boat?

A. Her stern was not quite clear of the end of pier 49, on her way into the slip.

Q. How were you heading as your bow first got inside of the line of the piers?

66 A. We were heading straight, if anything appeared to be little to starboard, that is towards 49, when we entered the slip.

Q. And your stern had just got inside of the end of the pier?

A. I don't think it had got quite inside of the pier; I am not prepared to say that; it got just about inside of the slip when the signals were given, probably not quite.

Q. Up to that time do you say your boat was pointing just about straight up the slip?

A. Yes, at the time the bells were given, but I could notice that the flood tide had caught our stern and was pushing it on the railroad float, and that the eddy inside had caught the bow and was

pushing her to port—that is, towards 48. That was my object in trying to save the boat, by trying to put in a soft fender between the railroad float and the *New Yorker*.

By Mr. WARD:

Q. How many engineers do you carry on your boat?
A. Three.
Q. How many of those engineers are attending to the engine in case of fire, and how many to the fire machinery of the boat?
A. They all assist each other—all do anything they can to help her along; there is only one man does the running and answering the bells.
Q. Who is that?
A. It depends on the man on watch; in this case it was Thompson running the engine—that is, the propeller engine.
Q. Is he here?
A. Yes; and a man named Schramm; he was preparing the hose to go to work.

By the COURT:

Q. How long is the *New Yorker*?
A. 126 feet 5 long.

By Mr. WARD:

Q. And her beam?
A. 26 feet.

By the COURT:

Q. Do you know what the width of the slip is really?
A. No, sir; I do not.
67 Mr. WARD: It is shown on the diagram. It is drawn to a scale, and shows it exactly.

Cross-examined by counsel for libelant.

By Mr. PUTNAM:

Q. How fast does the *New Yorker* go when she is going to a fire in the river?
A. About eleven miles an hour.
Q. And when you get a fire alarm you go full speed, of course?
A. Yes, sir.
Q. Had there been any bells rung to the engineer to slow at all until the four bells you say you heard when you went out there with the fender?
A. Oh, yes; there was several bells given out in the stream as he rounded to. He slacked down as he came to the pier.
Q. You are not a pilot, are you?
A. I am not a pilot; no, sir.
Q. Don't you know four bells are always rung on full speed?
A. No, sir, I do not.

Q. Do you think it had already rung one bell before he sounded the four?

A. It depends what bells were given before to understand the other bells. Do I understand your question right?

Q. Were these four bells all sounded at once, or two and an interval, and two more?

A. No, sir; four bells sounded.

Q. All at once?

A. All at once.

Q. And a jingle right after?

A. Yes, sir.

Q. At the time you heard them where were you standing?

A. On the starboard side, aft.

Q. Pretty near the stern?

A. Pretty near the stern.

Q. Could you tell whether the propeller was going at the time?

A. No, sir; I couldn't tell; I could only tell whether the velocity of the boat had been checked, which I see that it was.

Q. Can't you tell when the propeller is stopped and is backed?

A. Yes, sir.

Q. Did you feel that after the bells?

A. No, sir; it is a heavy boat and you can't feel it.

Q. Did you feel it at all?

68 A. No, sir; it is a heavy boat, you can't feel it, but I know the engine was stopped and started again; it is impossible to tell on deck whether it is put on the forward or back motion.

Q. You knew it was moving?

A. I knew it was moving; yes, sir.

Q. Was it stopped and moving again promptly after the bells?

A. Yes, sir; promptly.

Q. And you were standing with the soft fender at the time it stopped?

A. Yes, sir.

Q. Had they got up then so as to be near the car float when you first felt anything like stopping?

A. No; its headway was pretty well checked.

Q. You don't quite understand me. You felt motions that the engine stopped?

A. Yes.

Q. Were you up to the car float then, or not?

A. We were up to the car float then; yes, sir.

Q. How close to it?

A. The side of the boat was within about six inches of the car float and the outer end of it towards the river was about flush with the stern of the fireboat.

Q. Which was longest, the car float or the fireboat?

A. I think the car float was longest; to the best of my recollection, I think so.

Q. Was anybody else on deck with fenders besides you?

A. Yes, sir; there was some of the men had dropped the wooden oak fenders down on both sides.

Q. Were they attending them?

A. Yes, sir.

Q. How many?

A. There was about six or seven fenders on that side, and the men were busy at that time dropping the fenders down until they had them dropped down, but I stood there with a soft fender.

Q. These fenders that were hard fenders were dropped on both sides of the boat?

A. Yes, sir.

Q. And a man had each of the fenders?

A. No, probably one man could drop them all.

Q. How many constituted the crew on the *New Yorker* all told, counting yourself, that afternoon?

A. There must have been about nine or ten.

Q. How long is the hose of the *New Yorker?*

A. The hose of the *New Yorker*—we carry about 3,000 feet.

Q. And what size hose?

A. From two inches and a half to six inches in diameter.

Q. Can you pump right from the river into that hose?

A. Yes, sir.

Q. And you do that in putting out a fire?

A. Yes, sir; the only way we do it.

Q. You are not dependent on the city water at all?

A. No, sir.

Q. How far was the fire at the corner of Clinton street from the bulkhead?

A. Take the width of the street I would judge that it was probably 85 feet from the bulkhead; it might — been 100 feet.

The diagram referred to is offered in evidence and marked Respondents' Exhibit C.

Counsel for respondents offer in evidence the appointment of Mr. Gallagher as third-grade fireman. It is marked Respondents' Exhibit D.

JAMES A. GALLAGHER, being duly sworn and examined as a witness for the respondents, testifies:

Counsel for respondents offer in evidence a certified copy of special order No. 36. It is marked Respondents' Exhibit E.

Also section 40, chapter 210.

Also reads in evidence sections 264, 265 and 263.

By Mr. WARD:

Q. Are you a licensed pilot?

A. Yes, sir.

Q. How many years have you held your license as pilot?

A. I guess I have my ninth issue now.

Q. That means nine years?

A. Yes, sir.

Q. Are you employed by the city?

A. Yes, sir.

Q. How many years have you been in the employ of the city?
A. Since 1891.
Q. In June, 1891, were you detailed aboard the *New Yorker*?
A. I have been on the *New Yorker* since I have been in the department.
70 Q. On that day were you pilot of the *New Yorker*?
A. Yes, I was.
Q. How long before that had you been pilot?
A. Since February, 1891.
Q. You left pier A on the afternoon of June 11, to go to a fire between piers 48 and 49, did you not?

The COURT: They all agree he was going right in the slip straight.

Q. As you came up from pier 8 to go into this slip, state what happened and how you got into the slip?
A. We left the Battery about 4.30 and came up on the flood tide and hauled over for Brooklyn.
Q. What did you do that for?
A. To give ourselves room enough to round-to and go in the slip. When I rounded-to for New York shore and was hauling over—
Q. When you rounded-to, were you above or below pier 49?
A. Above when I rounded-to. I was above when I began to round-to, but I was below after I got rounded-to. I slowed down and stopped—then we were just below 49—so as to give the *Havemeyer* a show to get in out of our way.
Q. Where was the *Havemeyer* when you got up there?
A. She was right in the mouth of the slip.
Q. After you slowed——

By the COURT:

Q. At that time were you heading in a line with the piers or crosswise?
A. We were heading down the river, against the tide.
Q. Do you mean straight down or how?
A. On a line with the piers, just kept her stem to the tide, of course. It doesn't run exactly east and west there, I don't think.

By Mr. WARD:

Q. Go on and state how you got in, and why?
A. When the *Havemeyer* got in out of the road I rung the bell to go ahead and throwed my wheel to port so as to quarter in, go in quartering on.
Q. Why did you have to do that?
71 A. On account of the tide; I had to do that to give the swing on the stern and swing against the tide. The tide kept setting her down and I rung a jingle bell to hook her up, and I rolled my wheel hard-aport and kept it that way until we were, I guess, little over half ways in the slip, and I see the tide caught her bow and picked her up, and I see she wouldn't come for me or mind the helm, and I rung four bells and a jingle bell to go back.

Q. And then what happened?

A. We went in under the loom of the bark that lay at the dock, a small bark.

Q. Before you started to go in the slip you noticed what was in the slip, didn't you?

A. I did, yes, sir.

Q. You have heard the other witnesses testify as to the situation of the vessels in there?

A. I did, yes, sir.

Q. What was in the slip?

A. There was a bark laying there that we hit, that laid at 48; outside of her laid a barge, a square barge; and on the end of 48 laid a schooner lying very close on the end of the dock, her stern, I think, she laid bow in if I ain't mistaken; and on the opposite side on the end of 49 there was a railroad float; and in towards the bulkhead——

Q. And the railroad float, with reference to the water line of the piers, was lying how close up to it?

A. I should judge about five or ten feet in from the end of the piers. Then there was a small lighter laid in on 49, at the stern—or towards the bulkhead—of the railroad float, a small sailing lighter.

Q. Was the method you took of getting into the slip governed by the situation of these vessels in the slip?

A. Yes, oh, yes, sir.

Q. Was there any time that you left the pilot-house before the collision?

A. Before the collision?

Q. Before you struck the barge?

A. No, sir.

Q. What is the steering gear of the *New Yorker?*

A. It is steam and hand gear.

Q. Which gear were you using on this afternoon?

A. Steam gear.

72 Q. What is the fact in reference to the steam gear on the *New Yorker?* if you take your hand off the wheel or leave the wheel, what will happen?

A. The wheel will stand still.

Q. Where is the entrance to the pilot-house on the *New Yorker?*

A. The after part, right forward of the smokestack.

Q. Are there any side entrances to the pilot-house?

A. No, sir.

Q. How is the pilot-house, surrounded with windows or how are the windows situated?

A. Our pilot-house is square and there is windows all around, even in the door.

Q. After you struck or came into collision with the barkentine what did you do?

A. Went back from under her bow and went up in the slip alongside of the *Havemeyer.*

Q. And then commenced to play on the fire?

A. The barge had to haul there, haul down alongside of the *Linda*

Park to let us get in between the *Havemeyer* and the *Havemeyer* shifted back a little bit to let us get in. We shoved her head around when we squeezed in between her and the barge.

Q. Whom do you get your orders from?

A. From the captain of the boat.

Q. What orders did you get that afternoon?

A. I got orders to go in between 48 and 49.

Q. Where did you get those orders?

A. From Capt. Ryan.

Q. Where, what time?

A. On the boat, about I guess——

Q. What I mean is how long before you went into the slip did you get the orders to go in that slip?

A. When we were rounding-to.

Q. Did you go aboard the barkentine at any time after this collision?

A. I did, yes, sir.

Q. When?

A. After we were made fast and playing on the fire.

Q. Do you mean that is the same afternoon?

A. The same afternoon about half an hour——

Q. Whom did you see aboard the barkentine?

A. I saw the mate.

73 Q. Did you see *this* man?

A. No, sir.

Q. Did you see him?

A. No, sir.

Q. Was he on the barkentine at all when you went aboard?

A. He was not.

Q. So far as you know?

A. He was not.

Q. Did you have any conversation with the mate?

A. I did.

Q. Was he standing next to him?

A. No, he was not, the steward was alongside of him.

Q. But not *this* man?

A. Nobody.

Q. Did you make any statement to the mate——

Mr. PUTNAM: Ask what he said, what the conversation was.

The COURT: He is entitled to contradict the other man if he wishes.

Q. The mate testified: Q. "Did he talk to you? A. Yes; he said it was the engineer's fault, he gave the engineer the bell and the engineer didn't answer." Did you make any such statement?

A. No, I did not.

"Q. Did he say anything else? A. No, he only said the city of New York had plenty of money and would pay for it." Did you make that statement?

A. No, I did not.

Q. When you went aboard there and saw the captain what did you say?

A. I didn't see the captain.

Q. Or the mate; what did you say?

A. It was him that done the talking.

Q. What did he say?

A. He wanted to know who the boat belonged to. I went aboard the boat to see what damage was done and he says to me, he says, "Who does that boat belong to; does she belong to a corporation"? I said, "Yes, she belongs to the city of New York." I says to him, "Was there much damage done"? "Oh no," he said; "there ain't much, only the braces were carried away." And I told him that I would see if I couldn't get the repair shop people to come and take the braces and straighten them and put them back in their places. By and by, after, he sung out to me from the boat that the boom was punctured; and he said the captain was ashore, he didn't know whether to take the boom out or not.

74 Q. You are familiar with the course of tide and eddies around the piers in New York slips?

A. I am. Yes.

Q. What is the fact as to any existing eddy between pier 48 and 49 in the East river?

A. On what tide?

Q. On the flood tide that you came up on?

A. The tide sets down, inside of the piers the tide sets down; outside of course it sets up.

Q. And did you endeavor to get into the slip with the knowledge of that fact?

A. I did, yes, sir.

Q. And governed yourself accordingly?

A. I did, yes, sir.

Q. Do you know of any precaution that could have been taken by you as pilot of that boat to avoid this collision, that was not taken?

A. No, I do not.

Q. Was the collision, in your judgment, to be avoided if you went into the slip under the then existing conditions?

A. No, it was not.

Cross-examined by counsel for libellant.

By Mr. PUTNAM:

Q. You say when you went up there the *Havemeyer* was then at the entrance of the slip?

A. At the mouth of the slip.

Q. And you went in as soon as she had got past and gone in, didn't you?

A. As soon as I got room enough to go in, yes, sir.

Q. How long do you think, it was after she went in that you followed her?

A. She wasn't made fast to the bulkhead when we went in after her.

Q. Was there any change in the eddy or tide during that little time?

A. No, sir, there was not, not that I know of.

Q. Did you expect to have any difficulty going in after seeing her go in?

A. I did, yes, sir.

Q. Have you been in that slip before?

A. I was, yes, sir.

Q. With the *New Yorker?*

A. I believe I was.

Q. When?

A. I think it was about a year ago.

Q. Did you have any trouble then?

A. No; had a clear slip.

75 Q. Didn't collide with any vessel at that time?

A. No vessel in there to collide with.

Q. What did you say the length of the *New Yorker* is?

A. 126 feet.

Q. When you were first in the fire department you were a fireman of the third grade, according to this paper; what was that?

A. I was pilot as soon as I went in the fire department; that was only an appointment in the uniform force.

Q. What were your duties as fireman of the third grade?

A. To steer the fireboat *New Yorker.*

Q. And you were acting as pilot then?

A. I was; yes, sir.

Q. Before you were designated by the fire commissioners as pilot?

A. Yes, sir.

Q. And you made no difference before or after; that is, you acted as pilot all the time?

A. All the time; yes.

Q. When were you first acting as pilot on the *New Yorker?*

A. It was the day after her trial trip.

Q. When was that?

A. That was in—some time in February, 1891.

Q. And you have been pilot ever since, have you?

A. Yes, sir.

Q. Did you ever have a collision with her before?

A. I did; yes, sir.

Q. When?

A. Had my rail carried down—at the time the *City of Richmond* was burned—on the corner of a railroad float, the same way this occurred.

Q. The same place as this?

A. No, pier 24, East river. I said in the same way.

Q. As a matter of fact you attend wholly to the navigation of the boat, do you?

A. I do; yes, sir.

Q. You give all the orders, and ring the bells, and give the signals?

A. No, sir; I do not; I don't give orders at all. I ring bells, but I don't give no orders only in case of putting out a line.

Q. Don't you give orders about putting out a fender?

A. I do about putting out a fender, yes, sir.

76 Q. Any orders about going into a slip in respect to the speed of the vessel, or the steering of the vessel, are by you, are they not?

A. Yes, sir.

Q. How do you account for it that the *Havemeyer* went in and went clear of all these vessels and that you collided with the second vessel?

A. She is a different-handling boat from us.

Q. A smaller boat?

A. She handles different.

Q. She has hand steering and you have steam?

A. Yes, but she handles different anyway.

Q. Isn't steam gear a good deal better to handle a ship than hand gear?

A. It is providing you have got a rudder to handle them with.

Q. Wasn't it the fact that you rang four bells all at once just before the collision?

A. Yes, it was.

Q. And a jingle bell too.

A. Yes, sir.

Q. And how close were you to the bark when you did that?

A. I should judge we were at least about half a length away, not quite; I couldn't exactly say.

Q. Half a length of the fireboat do you mean, or half a length of the bark?

A. Half the length of the fireboat. We were half ways in the slip, about.

Q. Do you mean half way from the outer end of the bulkhead?

A. The centre of our boat was just about in the slip and there was about——

Q. The centre of the boat was about even with the outer end of the pier?

A. Yes, sir.

By the COURT:

Q. At what time?

A. When I rung the four bells; there was about half a length between us and the bark.

Q. So the outer half of your boat was outside of the slip?

A. Was outside of the slip and swinging up the river.

Q. Which was swinging up, your stern?

A. Our stern; and when she picked up and got inside—on the centre of the true tides she picked up, and that is the time I rung the four bells and the jingle bell.

Q. You said before you started up you were heading straight down the river?

A. That is before I went in the slip.

77 Q. You swung around through the westward, didn't you?

A. No, sir, we went to the northward. Yes, we were heading to the westward.

Q. You swung around head to the westward in order to get in the slip?

A. We were heading to the westward and swung to the north.

Q. Straight down the river isn't west?

A. About southwest, I guess.

Q. You went around that way?

—. ——.

By Mr. PUTNAM:

Q. Didn't you say you went around under a port helm?

The COURT: That would be right.

A. Yes, sir.

Q. And how far were you outside of the slip when you started to swing around to go in?

A. A length and a half.

Q. And were you then opposite 48 or 49?

A. 48.

Q. And you put your wheel aport to get in?

A. Yes, sir.

Q. When did you first change the wheel again?

A. When did I change it?

Q. After putting it aport when did you change it next?

A. I didn't change it at all.

Q. Kept it aport all the time?

A. Not until I backed out from under her bow.

Q. You had it aport all the time until the collision; is that right?

A. Yes, sir.

Q. Hard-aport?

A. Yes, sir.

Q. Did you strike either with the stem or the side anything else before you struck the bark?

A. I think not.

Q. Didn't you come in contact with the end of 49?

A. No, sir; I did not.

Q. Didn't you order fenders put out?

A. No, sir; only on the side fenders dropped down.

Q. Were not the starboard-side fenders out when you came up to 49?

A. The starboard-side fenders? I guess they were, I can't say for sure whether they were all down or not; I know the port-side fenders were down.

Q. What bells did you ring when you first started?

78 By the COURT:

Q. Did I understand you kept your wheel to port, hard-aport, all the time from the time you started up to get around so as to head into the slip until you struck this bark?

A. Yes, sir.

Q. When your bow got at the entrance of this slip, how far away were you from pier 49 and from the float, I mean below it; when your nose got up just in a line with pier 49, how far were you below pier 49?

A. Very near on a line with the stern of the schooner, or the starboard side of the schooner and on 48, so we came down and quartered in on her.

Q. How were you heading at the time your nose got up on a line with the end of the piers?

A. Do you mean on going in the slip or out in the river?

Q. Yes; when you got up so far your stem was just ready to go inside of the pier lines, what was the direction of your boat?

A. We were heading for the bulkhead.

Q. Were you heading across the slip to the north, or to the south, or how?

A. We were heading to the north.

Q. Heading somewhat towards pier 49?

A. Not exactly; no, sir; we were hauling that way, for pier 49, as we were going in, kept hauling around as we were going in.

Q. And you say then that your boat was nearly, your stem, down nearly as far as pier 48 when you got up to the line of the piers?

A. Almost on a line; not exactly on a line, because I made my calculation when I would go in there I would go in as close to 48 as possible and haul her down for the railroad float, so if she should pick up she wouldn't pick up as quick as what she would if we went right straight in.

By Mr. PUTNAM:

Q. Did you make any report of this collision to the inspectors?

A. I did; yes, sir.

Q. Right afterwards, did you?

A. I believe I did; yes, sir.

Counsel for respondents produces the report.

79 By the COURT:

Q. I understand you when you got as far as the end of the slip your boat was then heading a little up, a little across the slip towards pier 49?

A. No, sir; our stern was more towards pier 49 and our bow more towards pier 48.

Q. Then you hadn't got swung around yet?

A. No, we wasn't exactly straight.

Q. You think at that time your bow was nearly in line with the schooner?

A. Pretty near it; yes, sir.

Q. Didn't the schooner come very nearly out to the end of the pier?

A. Very near. Her stern, I believe, was out very near the end of the pier; about ten feet away.

Q. At that time, I understood you to say before, that your engines were moving ahead full speed?

A. They were; yes, sir; but my boat wasn't moving full speed.

Q. Your engines were moving at full speed?

A. Yes, sir.

Q. Nearly in line with the side of the schooner, not far away from her and heading towards the schooner?

A. More in the middle of the slip; we were heading towards the schooner; yes, sir.

By Mr. PUTNAM:

Q. Did you have a talk with any one else on board the bark that night except the mate?

A. No; I did not.

Q. Did you know of the name of anybody else there except the mate?

A. On the ship? No, sir.

Q. How do you know whether a man was a steward or what he was, that you say was there?

A. Because I could see his apron on and his sleeves rolled up.

Q. That is the only man you saw there at the time?

A. That is the only man I saw at the time; yes, sir.

Q. What time do you say that was?

A. About an hour after the collision.

Q. Will you swear you didn't state to the mate that it was the engineer's fault?

A. I will; yes, sir.

Q. You did not so state?

A. I did not; no, sir.

80 Q. As far as you could judge, the engineer answered the bells promptly?

A. From what he says he did; yes, sir.

Q. Couldn't you tell in the pilot-house whether he answered them promptly?

A. No, sir; I could not.

Q. Isn't there a return tube from the pilot-house down to the engine-room?

A. Yes, sir.

Q. Can't you hear what goes on?

A. No, sir; I cannot, without he talks to me.

Q. Did you talk through it?

A. No, sir; I did not.

Q. Didn't you speak through it at all?

A. No, sir; I didn't speak through it at all.

Q. Simply rang the bell?

A. Yes, sir.

Q. Isn't it a fact that you went out of the pilot-house before the collision?

A. Before the collision? No, sir, I did not.

Q. Isn't it the fact that the front of the pilot-house was struck by some part of the vessel?

A. Yes, sir.

Q. Didn't you run out?

A. No, sir.

Q. You are as positive of that as of anything you have testified?

A. Yes, sir.

Q. You stayed in the pilot-house all the time?

A. The rules and regulations got broke on my head when the pilot-house got broke.

Q. That is the first time you broke the rules and regulations?

A. That is the first time the rules of the road, yes, sir.

Q. Which was the schooner heading, bow out or stern out?

A. I think she was heading bow in.

Q. Had you rung any bells to the engine-room from the time you turned around out in the river to go in until you got inside of the slip, as you have stated, and rang four bells?

A. Had I rung any?

Q. Between those times.

A. Between the four bells and the time I rung the jingle bell to go ahead?

Q. When you were out of the slip heading head down the river you rang the bell to go ahead, didn't you?

A. Yes, sir.

Q. And then rang a bell to go full speed?

A. Jingle bell, yes, sir.

81 Q. Did you ring any other bells before the collision?

A. No, sir; I did not.

Q. Isn't four bells the usual signal for full speed when you want to stop and reverse?

A. If you are going ahead full speed it is to go full speed back.

Q. And the jingle is to back her strong?

A. To back her hard; yes, sir.

Q. How close do you say the bow of the *New Yorker* was to this bark when you first rang those four bells?

A. About half the length of the *New Yorker*.

Q. That is, about 50 or 60 feet?

A. Somewheres along there.

Q. After the collision how did you get clear of the *Linda Park*?

A. Backed out.

Q. How was the helm then?

A. The helm was to port.

Q. Still to port, was it?

A. Yes, sir.

Q. And how far did you have to back to get clear?

A. About 15 feet.

Q. How did you go then?

A. Rung a bell to go ahead and went up in the slip.

Q. You went right up to the bulkhead, did you?
A. I did; went in between the *Havemeyer* and the barge, up to the bulkhead.
Q. Had no trouble?
A. No, sir; only the barge had to haul out of our road.
Q. How close did you come to the *Havemeyer?*
A. Right alongside of her.
Q. With your stem to the bulkhead the same as hers was?
A. Yes, sir.

By the COURT:

Q. Were you ahead of the lighter that lay alongside of the bark, your boat, or did your stern lap that boat?
A. Her bow lapped on our side.
Q. The lighter's bow?
A. The lighter that laid alongside of the *Linda Park*, her bow laid on our rail.
Q. Lapped it a little?
A. Lapped it, so we had to put a fender in there to keep it from chafing the rail, and we both laid catte-cornered across the slip.

82 By Mr. WARD:

Q. I wish you would take this diagram (Exhibit C) and show what course you took after you got up here, from the time you saw the *Havemeyer*, to go in; indicate the course you took, using that model.
A. (The witness does as requested.)

By Mr. PUTNAM:

Q. You hooked up, you say, because you were afraid you were going to hit the end of 49?
A. Yes, and to give her a swing.
Q. And for fear you might strike and take the side out?
A. Yes.

By Mr. WARD:

Q. On what?
A. On the outer corner of that railroad float and the slip.
Q. In coming up did you run into pier 49 with the *New Yorker?*
A. No, sir.

The extract from the minutes of the board of fire commissioners appointing Frederick Thompson fireman of the third grade, and engineer of the steamer *New Yorker*, is offered in evidence and marked Respondents' Exhibit F.

FREDERICK THOMPSON, being duly sworn and examined as a witness for the respondent-, testifies:

By Mr. WARD:

Q. Are you in the employ of the city?
A. Yes.

Q. And of the fire department?
A. Yes, sir.
Q. Assigned to what fire company?
A. Engine company 57.
Q. That engine company is what?
A. That is the fireboat *New Yorker*.
Q. You have been on the *New Yorker* for how long?
A. I have been there since the 1st of February, 1891.
Q. You have been an engineer since 1891 on the fireboat *New Yorker?*
A. Yes, sir.
83 Q. How many engineers are there aboard the *New Yorker?*
A. Three.
Q. Were you aboard of her on the 11th of June, 1893?
A. Yes, sir.
Q. You remember going down to between piers 47 and 48?
A. Yes, sir.
Q. Were you taking the bells from the pilot-house that day?
A. I was.
Q. Did you get any bells immediately before the collision?
A. Yes.
Q. What bells did you get?
A. I got four bells and a jingle.
Q. And that signifies what?
A. To go astern full speed.
Q. Did you answer the bells?
A. Yes, promptly; very promptly.
Q. Did the engines answer promptly, too?
A. Yes, sir.
Q. The engines were in good order?
A. Yes, sir.
Q. How long a time had elapsed between the time you got those four bells and the jingle and the last signal you got from the pilot-house before that?
A. Oh, probably a minute or a minute and a half.
Q. And what was the signal that you doubtless got from the pilot-house before these four bells?
A. Before these four bells? To stop.
Q. And that is what?
A. One bell.
Q. And you obeyed that promptly?
—. Yes, sir.
Q. After you got your four bells and your jingle, how long a time elapsed before you got any other signal from the pilot-house?
—. Oh, I couldn't say. I couldn't say exactly to the time. We moved around quite some there in the slip before we got in position alongside of the *Havemeyer*.
Q. During that time you kept getting signals; is that the idea?
A. Yes; kept working the boat, and I couldn't specify the time exactly.
Q. Did you see the collision?

A. No, sir.
Q. Where was your engine-house on the *New Yorker*, below decks?
A. Below decks, yes, sir. The engineer cannot see anything on deck.
84 Q. Did you come up out of that engine-house?
A. No, sir; I did not.

Cross-examined by counsel for libelant.

By Mr. PUTNAM:

Q. You were chief engineer of the boat?
A. I am assistant engineer; my papers calls for that, my certificate from the local inspectors.
Q. Who was chief engineer?
A. There he is there.
Q. Was he on board at the time?
A. Yes, sir.
Q. Was he in the engine-room at the time?
A. I couldn't say.
Q. Was there any one in the engine-room with you at the time?
A. I couldn't say that.
Q. Don't you recollect?
A. There might been in the engine-room and on the opposite side of the engine and I couldn't see them.
Q. You don't remember seeing any one?
A. They passed to and fro at the time, everything was all excitement.
Q. Don't you have charge of getting the engine ready to work the fire-pumps too?
A. That don't make any difference either way.
Q. Does the same engineer have charge of both the propelling machinery and the fire-pumps?
A. Yes, sir.
Q. Had you got the pumps ready to operate whenever the hose was connected?
A. No, I was operating the main engine, the propelling engine.
Q. Were the pumps also ready?
A. They were, yes.
Q. Who had charge of connecting the hose?
A. The men on deck.
Q. They have a separate engine for the pumps besides the one that is propelling the ship, don't they?
A. Yes, sir; two distinct engines.
Q. They are in the same room?
A. They are in the same room.
Q. Who was doing anything to that besides you?
A. To what?
85 Q. To the pumping engines?
A. To the pumping engines? Another engineer.
Q. Who was he?
A. Mr. Schramm.

Q. Was he in there?
A. He was there at the time, but he wasn't there just at that moment, I couldn't say; but he was in and around there and all over the boat.
Q. Who was the superior, you or Mr. Schramm?
A. Mr. Schramm was superior.
Q. Is he the chief?
A. He is the chief engineer.
Q. You have already stated you couldn't tell whether the chief was there or not at that time?
A. He was aboard the boat.
Q. But whether he was in the engine-room or not?
A. That I couldn't say.
Q. As matter of fact when you were in the engine-room you have charge of all the engines in the room, while you are there?
A. Yes, sir.
Q. And you did on this occasion?
A. Yes, sir.
Q. Coming up the river she was hooked up, wasn't she?
A. Yes, sir.
Q. Full speed?
A. Yes, sir.
Q. Then you got bells to stop?
A. Yes, sir.
Q. And you remained stopped some time?
A. We got a bell to slow down?
Q. Did you get a bell to stop?
A. Got a bell to slow down and another bell to stop?
Q. When was that?
A. I couldn't say what time it was.
Q. Do you know how long it was that your engine was stopped, not turning?
A. I should judge couple minutes.
Q. What was the next bell you got after that?
A. Got a bell to go ahead.
Q. And was that one bell or two?
A. That was one bell to go ahead.
Q. Do you know where the boat was at that time?
A. I couldn't tell.
Q. Did you get a bell also to hook her up?
A. Yes, sir.
86 Q. How long was that after the bell to go ahead?
A. Oh, it was right on top of it.
Q. And then from that time you did hook her up?
A. I did.
Q. How many pounds of steam did you have on at that time?
A. 95 or 100.
Q. Full pressure?
A. Yes, sir.
Q. And you went hooked up until you got the four bells to stop and back?

A. Yes, sir.

Q. That was how long a time, do you think?

A. It couldn't been over two minutes; just long enough for a boat to enter her slip, I suppose; that is about all.

Q. Did you feel the blow of the collision?

A. No, sir.

Q. Or hear any crash?

A. No, sir.

Q. You didn't know exactly when it occurred?

A. I couldn't say anything at all about the collision.

Q. Did you hear any hails from outside the engine-room door while you were in the engine-room?

A. No, sir.

Q. From anybody?

A. No, sir; the engine-room is below decks.

Q. Did you hear anything from Mr. Schramm?

A. No, sir.

Q. When was he last in the engine-room, to your knowledge, before the collision?

A. Just about, I should judge, when we were off the end of pier 48 or pier 49.

Q. You said there was a good deal of excitement in the engine-room; what did you mean by that?

A. I didn't say in the engine-room. I said about the boat in general.

Q. Could you tell what was going on about the boat; did you hear any talk up above?

A. No, sir.

Q. What did you hear?

A. You could hear men running back and forth and one thing and another, getting lines ready to go ashore and all that kind of thing.

Q. There is no excitement about that, is there; that is a
87 usual thing for a boat coming to a wharf—getting lines ready?

A. I mean the lines of hose going ashore to extinguish the fire.

Q. That is a usual thing on your boat, isn't it?

A. Well, sometimes.

Q. Is that all you meant by saying there was good deal excitement?

A. No. But everybody had enough to do to attend to their own business, whatever duty they were to perform.

Q. Isn't it the fact you had as part of your own business two engines to look after at that time?

A. No, sir, I did not.

Q. Haven't you said that when you are in the engine-room you have charge of both the engines there?

A. Yes, if I happen to be there I have.

Q. And you were there?

A. Yes, sir; if I was there alone I would have charge of everything in there.

Q. Do you know whether the hose had been coupled on?
A. I couldn't say.
Q. Had the pumps been tried to see whether they were in working order?
A. They are tried every week.
Q. Had they been tried there at that time?
A. It is not necessary to try them.
Q. Had they been?
A. No, sir.
Q. Had the pumping engines been warmed up any to see whether they could work?
A. Yes, they had.
Q. When was that done?
A. When was that done? In coming up the river where we could see the fire.
Q. And you had done that, hadn't you?
A. No, sir; I didn't do that. Mr. Schramm did that.
Q. And they had been started?
A. Yes, sir; they had been turned over.
Q. Were they working at the time you went in the slip?
A. They were slowly turning over, very slowly.
Q. So as to be ready to pump?
A. As soon as we were made fast.
Q. How long had they been turning over?
A. Probably five minutes.
88 Q. When you start the pumping engines don't you begin very slow and then gradually let little more steam in them as the cylinder gets warm?
A. Yes, that is the case in most engines.
Q. And that was the case this time?
A. Yes, sir.
Q. But after Mr. Schramm started them he went out didn't he?
A. Yes.
Q. Where did he go?
A. I don't know where he went exactly.
Q. He was in some part of the boat?
A. Yes, sir.
Q. Didn't you let steam into the pumps after he went out?
A. No, sir, I did not.
Q. You are quite positive of that?
A. I am quite positive about that.
Q. Who did do that? After Mr. Schramm went out was there anybody there but you?
A. Yes. He came back.
Q. When did he come back, before the collision?
A. No, sir; I didn't see him.
Q. Did you get any bells that you can recollect right after these four and the jingle?
A. Did I get any after the four?
Q. That you can recollect now?
A. That I can recollect now? We got quite a number after that.

Q. Can you remember what the next bells were that you got after the four bells and the jingle—you say you don't know anything about the collision?

A. No, sir, I don't.

Q. What was the next bell you got after the four bells and jingle?

A. I got a bell to go ahead again.

Q. One bell?

A. Yes, sir.

Q. Did you get any other bell that you recollect?

A. Yes; I got quite a number.

Q. But I mean the next two orders after the four, can you recollect what they were?

A. The next two?

Q. The first was to go ahead.

A. To go ahead.

Q. What was the next?

A. A bell to stop again.

Q. Did you ever get a bell to back after those four and the jingle?

A. I might have, to get her in position, in the right position alongside of the *Havemeyer*.

89 By Mr. WARD:

Q. When you speak of two engines what two do you speak of?

A. The propelling engine of the boat and pumping engines are two distinct engines.

Q. Does the same man have charge of the pumping engine and the fire engine?

A. The propelling engine you mean? Yes, if that man happens to be there at that time.

ERNEST F. SCHRAMM, being duly sworn and examined as a witness for the respondents, testifies:

By Mr. WARD:

Q. Are you in the employ of the city of New York?

A. Yes.

Q. In what capacity?

A. As engineer on the fireboat *New Yorker*.

Q. How long have you been such engineer?

A. Since the boat was organized.

Q. When was that?

A. February 1st, 1891.

Q. And were you aboard of her on the 11th of June, 1893?

A. Yes, sir.

Q. What are you—chief engineer?

A. Yes.

Q. Are you responsible for the engine-room?

A. Yes; when I am there.

Q. Whom did you have there that day with you?

A. Mr. Thompson.

Q. Did you detail him to any specific work?

A. That was his watch that day.

Q. Is there any particular duty goes with any particular watch?

A. I was in the act of going to my supper when the alarm came in; instead of going to my supper I went to the fire. That was his watch on and he took the engine, being he reached there before I did. It has always been the rule there, whoever's watch it was he would handle the engine going out to the fire.

Q. To save time is that?

A. That is to save time, and being it is his watch, it is his place.

90 Q. Did you take any part in working the engines, either the engines of the boat or the fire engines, on this afternoon?

A. I didn't touch the propelling engine that day at all.

Q. What did you touch?

A. I started the fire pumps—two set of them.

Q. You took charge of the fire pumps?

A. I started them, warmed them up, and let them turn over slow. I see the fire was coming through the roof and I knew I was going towards that, and of course I got ready to throw water.

Q. Did you have any other duty in connection with getting ready to throw water except turning over of the engines?

A. I had to run back and forth to the fire-room; fill up the water in the boiler and seeing the stokers were doing their best to get the steam up to the highest point, for I knew we were going to get all we wanted in a little while.

Q. Were you in the engine-room at any time when bells were given?

A. Yes.

Q. What bells did you hear given?

A. I didn't pay no attention. I was busy running back and forth from the fire-room to the engine, starting the fire pumps and fitting the boiler, and so forth, and directing the stokers, and I didn't pay no attention to the bells.

Q. Did you see the collision?

A. No, sir.

Q. Where were you at the time of the collision?

A. I was in the act of coming up the engine-room steps to go on deck when I felt the shock.

Q. Were you on deck at any time while they were going into the slip?

A. No, sir; immediately after the collision I was.

Q. Where were you when you were last on deck before you went in the slip—where was the *New Yorker?*

A. That I really couldn't say, because—we might have been at 47. I could see the fire you might say two blocks ahead; I think it might — been two or three piers below the fire.

Q. Did you have the same fires in the engine-room on this day you usually have on the *New Yorker?*

91 A. Yes; we were one man short, but sometimes we have got to have them that way.

Q. That didn't interfere with working the engines?
A. No, sir.

Cross-examined by counsel for libelant.

By Mr. PUTNAM:

Q. Who was the man short?
A. One of my side partners; an engineer, too.
Q. What is his name?
A. Al. Burtis.
Q. Is he assistant engineer?
A. He is assistant engineer also; yes, sir.
Q. What is he, first assistant or second?
A. Second, you might call him. He is the last on the list, the last man appointed.
Q. How many engineers are there regularly attached to your fire company, or to the boat *New Yorker?*
A. Three, including myself.
Q. On this occasion you had only two?
A. I had one besides myself.
Q. Did you attend to the pumping engine except to turn the steam onto them at first?
A. I turned the water over and everything else.
Q. The pumping engines, you were the first one that opened the valve to connect?
A. That day; yes, sir.
Q. And you went out to see to the stokers to get up as good fire as you could?
A. Yes, sir.
Q. You have often pumped water on fires with that boat?
A. Yes.
Q. And you have to have your full head of steam?
A. Not necessarily; we could do good with less.
Q. Do you ever use the full length of hose?
A. What do you mean by the full length?
Q. I understand you have several thousand feet.
A. We never use them all in one straight line.
Q. But you sometimes use two lines out at once?
A. Oh, we use as many as twelve at one time.
Q. No difficulty to have them run two or three hundred feet, is there?
A. The further the stretch the worse the result.

Q. You said that at the time of the collision you were
92 coming up the steps?

A. I was in the act of coming up the engine-room stairs.
Q. On which side?
A. On the starboard side.
Q. Could you see anything then?
A. Not then. I felt the collision before my head cleared the deck.
Q. Where did you go then?

A. I stood out for a minute, right out on the trunk deck, and really didn't feel a shock. It was something, I didn't know quite, attracted my attention. I looked around and see that our bow was afoul of the bowsprit of a bark which afterwards turned out to be the *Linda Park*.

Q. When you say trunk deck what do you mean?

A. A little house above the main deck is what we call the trunk deck.

Q. That is the deck aft of the pilot-house?

A. Yes, sir.

Q. And when you are there you can see both sides of the boat, can't you?

A. Pretty near—that is, as far as the pilot-house; of course the pilot-house obstructs the view little bit.

Q. As you came up from the stairway leading below, do you remember whether you came up and turned on the port side or starboard side?

A. I turned to port.

Q. That is towards the bark?

A. Yes, sir.

Q. And you were standing right there at the time of the collision?

A. No, sir; this was after the collision I got on deck, because while in the act of going up the stairs the shock of the boat striking something—I don't know, I felt kind of a graze like, I felt it and it kind of made a sliding motion to me.

Q. Was there any call for you to come up?

A. No more than I wanted to see if we wasn't pretty near there to get ready to start the water for them.

By the COURT:

Q. Put the models to show how the boat was heading at the time you saw it afoul of the *Linda Park's* bowsprit.

(A. The witness does as requested.)

The COURT: That is at an angle of about four points towards pier 48.

93 By Mr. PUTNAM:

Q. Where did you go right after that?

A. I went up forward to help clear away that martingale and side stays and one thing and another.

Q. There was damage to the pilot-house?

A. There was damage to the pilot-house a little, the front awning was torn.

Q. The front of it broken in?

A. Yes, sir.

Q. You are quite sure you didn't hear any hails to come up?

A. No, sir.

Q. Just mere accident you happened to be——

A. That is all; I came up to see if we was nearing the slip.

Q. Where did you come from when you came up the stairs?

A. From the engine room.

Q. You just came from the stokers?

A. No; I had been in the engine-room starting the pumps and getting ready, and I looked at the water in the boilers and thought it was pretty near time to see where we were.

Q. Whom did you see in the engine-room when you came up?

A. Engineer Thompson working the engine.

Q. Had you noticed those four bells?

A. I couldn't say; no, sir; I didn't pay no attention.

Q. Isn't it a fact that four bells and a jingle to an engineer would arouse his attention?

A. Not in our business.

Q. Did you go aboard the *Linda Park* after the collision?

A. I did next day by request of our captain to see what damage was done.

Q. You mean by the request of the captain of the company?

A. Of the *New Yorker*, yes, sir.

Q. To examine the damage?

A. Yes, sir. I think it was the next day.

Q. Are you sure it was not that night?

A. I am sure it was not that night.

Q. Did you have any talk at that time?

A. No, sir; I was too busy to go anywheres.

Q. When you did go aboard the vessel, did you have any talk with the people?

A. No, sir.

Q. You looked at the damage and made a report?

A. Verified the captain's statement, that is all.

94 JOHN R. SHIELDS, being duly sworn and examined as a witness for the respondents, testifies:

By Mr. WARD:

Q. Are you in the employ of the city of New York?

A. Yes, sir.

Q. In what capacity?

A. Assistant secretary of the fire department.

Q. How long have you been assistant secretary?

A. Have been assistant secretary for about two years now.

Q. Are you familiar with the method of doing business and carrying the different credits and accounts of the department?

A. Generally, yes, sir.

Q. Has the fire department any fund which is subject to the control of the head of the fire department so that they can pay out or as matter of fact do pay out over the vouchers of the head of that department?

A. The fire department has no control of any funds other than the relief fund.

Cross-examined by counsel for libellant.

By Mr. PUTNAM:

Q. How are payments audited that are required by your department?

A. Upon bills approved by the board of fire commissioners; transmitted to the finance department and paid.

Q. And on their auditing where are the bills sent?

A. Sent to the finance department by the board of fire commissioners.

Q. To the finance department of the city?

A. Yes, sir.

Q. And they are paid like any bills that the city has to pay in any of its departments?

A. Yes, sir.

Q. Suppose you have to repair one of your—say the pilot-house of this boat, how is that paid?

A. That is paid upon a bill of the party who makes the repairs. That bill is—a copy is filed in the fire department headquarters, it is audited by the board of fire commissioners, and then transmitted to the finance department for payment.

95 Q. And in that way it is paid?

A. Yes.

Q. And that is the regular course in which all your bills and payments are made?

A. Yes, sir; except, as I said before, as to matters for the relief fund.

Respondents rest.

Counsel for libelant offers in evidence the following extract from the official Government tide table:

"On Sunday, June 11, 1893, it was high water in the forenoon at 5.12; in the afternoon at 5.42, at Governor's island."

That opposite this prediction is the word-, "Average tide currents medium."

ALISON BRIGGS, being duly sworn and examined as a witness for the libellants, testifies:

By Mr. PUTNAM:

Q. You have been engaged in this harbor for how many years as tugboat captain?

A. As captain, thirty-three years.

Q. Have you, besides the command of ordinary tugboats, commanded boats for the city?

A. Yes, sir.

Q. For what department?

A. The department of charities and correction.

Q. During the time that you have been in command of tugboats,

are you familiar with the tides in the East river, and particularly in the location about piers 48 and 49 in the East river?

A. Yes, sir.

Q. Have you had occasion to land vessels at pier 48 and 49?

A. Yes, sir.

Q. Recently?

A. At 48 within a month.

Q. You have had occasion of course to observe the tides in the East river?

A. Yes, sir.

Q. What is the best time in the tide for landing vessels at those piers?

A. High-water slack considered the best.

96 Q. And how long does the tide run up in an eastward current after it is high water by the tide tables, usually?

A. With no wind, about an hour and a quarter; thereabouts.

Q. How would the tide be at piers 48 and 49 an hour before high water, or about that?

A. It would be strong flood tide.

Q. Are you familiar with the construction of piers 48 and 49, as to the crib at the end?

A. Very well; yes, sir.

Q. About how long a solid crib is there at the end of the piers?

A. I should think from 30 to 40 feet; I don't know exactly.

Q. Inside of that how is the pier supported?

A. By piling.

Q. How is the tide about the cribs?

A. On the flood tide the crib will form an eddy.

Q. How is it inside of the crib and between the crib and the bulkhead?

A. On the strength of the flood tide or half tide the tide will be running up through.

Q. That is from 48 to 49?

A. Yes, sir.

Q. How does it compare inside the crib with outside the crib?

A. It doesn't run so strong.

Q. But it would still run up, would it?

A. Slightly, yes, sir.

Q. Is it ever necessary, in your experience, with a heavy boat to go in there rung at full speed in between those piers?

Objected to, that the conditions must be known which existed there at the time when the boat went in before the witness can say it is necessary.

The COURT: Give him the statement of the vessels as stated by the witnesses.

Q. Do you know the fireboat *New Yorker*?

A. Yes, sir.

Q. Seen her a great many times, haven't you?

A. Yes, sir.

Q. She is a heavy boat as distinguished from a light boat?

A. Considered so, yes, sir; I have not been on board of her.

97 Q. Suppose that a boat like the *New Yorker* enters between piers 48 and 49 an hour before high water, and there are vessels on both sides of the slip, and the tide is running up flood outside of the crib, and the vessel has swung around and heads to pass in between piers 48 and 49, what is the prudent way among seamen to take such a vessel safely in?

A. A vessel of her size and weight I should deem it safe to land on pier 49 and get a line out and work around.

Q. And warp in?

A. Yes, sir.

Q. Suppose you didn't do that, would it be prudent and safe to go in ringing her up at full speed to take her by 49 or the vessels at the edge of pier 49?

A. Would I deem it safe? Not to keep her hooked up for any length of time.

Q. When you pass between the cribs and get to the water that runs under the piles, what would the current be at that stage an hour before high water?

A. There ought not to be much current in the slip an hour before high water.

Q. You say you have brought vessels to pier 49 within a month?

A. Not 49, 48. But I have put steamers into 49, one steamer.

Q. How large a steamer?

A. A steamer called the *Hartmann*, I should judge five or six hundred tons.

Q. Much larger than any of these fireboats?

A. Oh, yes, sir.

Q. Suppose that a vessel entering at that stage of the tide has the way off her altogether, which way would she drift between piers 48 and 49 after she has come between the crib?

A. I shouldn't think there would be much current at that stage of the tide, it being so near slack water.

Q. But whatever current there was would drift towards which pier?

A. I should think towards 49—I should think so. The winds govern the tide considerably there in that location.

Q. Suppose the wind was very light from the eastward and it was a fine day, would that affect the tide materially?

A. I think not.

98 Cross-examined by counsel for respondents.

By Mr. WARD:

Q. Do you know how much open water there is between piers 48 and 49?

A. I should think 250 feet; I should think so; I don't know, understand.

Q. Is it on that assumption that your testimony has been based, that there is 250 feet of open water between the two piers?

A. No; I should say between those two piers there will probably be 125 feet.

Q. It is on that assumption that your testimony has been based?

A. And my knowledge of the place; yes, sir.

Q. In testifying you have assumed there was that amount of open water between, 125. Is that the fact?

A. Yes, sir.

Q. When you speak of the solid crib-work under pies 49, is there the same thing under pier 48, solid crib-work at the end of it?

A. I think there is; yes, sir.

Q. That extends in both piers, you think, 20 or 30 feet back?

A. Somewheres along there; I don't know the exact measurement.

Q. Isn't it the fact that, with the tide running strong, the effect of that solid mason-work with open piling back would be to make a very strong current through the open space between the spiles?

A. No, sir.

Q. Do you know whether there is any eddy in there between piers 48 and 49?

A. Yes, sir.

Q. There is an eddy?

A. Yes, sir.

Q. Strong?

A. That is owing to how strong the tide is running outside.

Q. Take the tide running flood, is there a strong eddy?

A. If the tide is running strong outside.

By the COURT:

Q. Which way does the current run?

A. Towards this abutment, this crib-work as you call it; as the tide goes up past it forms an eddy behind that.

Q. Which way does the current of the eddy run?

A. Runs down.

99 By Mr. WARD:

Q. Runs against the tide?

A. Not against the tide, but runs in the opposite direction.

Q. Where did you land at pier 48, on which side of the pier, between 48 and 47 or 48 and 49?

A. 47 and 48 the last time I was in there.

Q. When you were there before that?

A. I am in there often, you know, with vessels.

Q. Assuming that there was a railroad float about 40 feet wide at the end of pier 49, and that there was a schooner about 30 feet wide at the end of pier 48—reducing the open water in the slip by about 70 feet—and you had to get in there, and get in there in a hurry, as the fireboats do, do you think it would be careless navigation under those circumstances to go in at such speed as would enable you to avoid the danger of collision with the railroad float at the end of 48?

A. Would I consider it dangerous? I would, yes, sir—with a

boat of her weight, understand. You are speaking of the *New Yorker?* Yes, sir.

Q. Your idea is in that case the safe way of getting in would be to stop and warp in?

A. Yes, sir; we call it getting a spring-line out; of course it would answer the same.

Q. Would the fact that the fireboat was called there to put out a conflagration, the conflagration was actually blazing, alter your views as to the way of getting in?

A. I don't think that materially alters the safety of navigation there.

Q. Then if you were in command of the *New Yorker* you would stop and warp in?

A. I should consider that the safest to do.

By the COURT:

Q. How much longer would it take to go in by the warp than it would without one?

—. I think you could go in just about as soon.

By Mr. WARD:

100 Q. You think you could warp in as soon as you could go in full speed?

A. In many circumstances, in that particular instance, because if you warp in and get the boat straight you can go straight ahead, but when you go full speed you have to stop and back unless your boat is small enough to turn and go straight up the slip.

Counsel for respondents offer in evidence the appointment of Ernest F. Schramm, as a fireman of the third grade, in the fire department.

It is marked Respondents' Exhibit G.

Counsel hereupon sum up the case:

Mr. Ward, for respondents.

Mr. Putnam, for libellant.

101 RESPONDENTS' EXHIBIT B.

Headquarters fire department, city of New York.

WEDNESDAY, *August 20th*, 1890.

The board of commissioners met this day.

Present: President Henry D. Purroy in the chair, and Commissioners S. Howland Robbins and Anthony Eickhoff.

Communications were received and on motion disposed of as follows:

From the civil service examining board certifying names of officers and men eligible for promotion to the position of foreman and assistant foreman.

Filed and ordered that the promotions ordered on the 2d ultimo, subject to examination, be confirmed, to take effect on the 22d instant, as follows:

Assistant Foreman Patrick F. Ryan and

* * * * * * *

to be foremen at a salary of $1,800 per annum.

On motion the board then adjourned.

(Signed) CARL JUSSEN, *Secretary.*

A true extract from the minutes.

JOHN R. SHIELDS,
Assistant Secretary.

(Here follows diagram marked p. 101*a*.)

102 R'SP'D'TS' EX. D.

Headquarters fire department, city of New York.

WEDNESDAY, *February 18th*, 1891.

The board of commissioners met this day.

Present: Commissioners S. Howland Robbins and Authony Eickhoff.

Appointments.

The president *pro tem.* reported the appointment of the following ununiformed firemen as fireman of the 3rd grade, to take effect from the 16th instant, with salary at the rate of $1,000 per annum, which was approved:

* * * * * * *

James A. Gallagher.

* * * * * * *

On motion the board then adjourned.

(Signed) CARL JUSSEN, *Secretary.*

A true extract from the minutes.

JOHN R. SHIELDS,
Assistant Secretary.

R'SP'TS' EX. E.

Headquarters fire department, bureau chief of department, 157 & 159 East 67th street.

NEW YORK, *June 30th*, 1891.

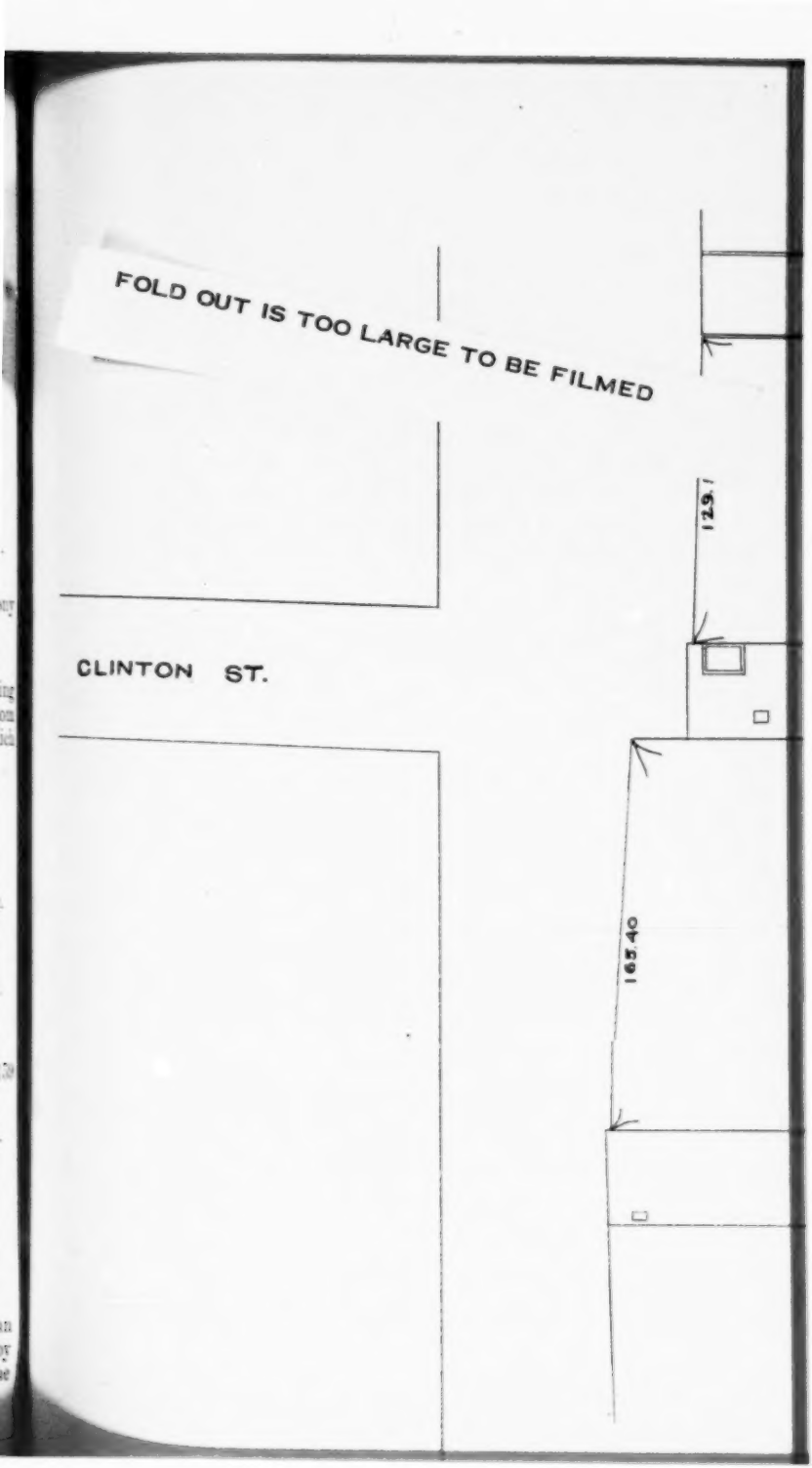
Hugh Bonner, chief of department.

Special Orders.

Copy.

No. 46.

1. Fireman 1st grade, John McCarthy, No. 3, and fireman
103 3d grade, James A. Gallagher, of engine Co. No. 57, are hereby detailed as pilots on the fireboat the *New Yorker*, and the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provisions of sections 264 and 265 of article VI, rules and regulations, will apply to the uniformed pilots.

By order of—

(Signed) HUGH BONNER,
Chief of Department.

Fire department, city of New York, April 7th, 1894.

A true copy.

[SEAL.] JOHN R. SHIELDS,
Ass't Secretary.

R'SP'D'TS' EX. F.

Headquarters fire department, city of New York.

WEDNESDAY, *October 5th*, 1887.

The board of fire commissioners met this day.

Present: President Henry D. Purroy and Commissioner Richard Croker.

* * * * * * *

Resolved, That fireman 3d grade, Frederick Thompson, of H. & L. Co. No. 3, be and is hereby appointed to the position of engineer of steamer, to take effect from the 8th inst., and assigned to engine Co. No. 43.

* * * * * * *

On motion the board then adjourned.

(Signed) CARL JUSSEN, *Secretary.*

A true extract from the minutes.

JOHN R. SHIELDS,
Assistant Secretary.

104 R'SP'D'TS' EXHIBIT G.

Headquarters fire department, office board of commissioners.

NEW YORK, *April* 13, 1889.

Special Orders, No. 30. (Extract.)

IV. Fireman 3d grade, Ernest F. Schramm, of engine Co. No. 51, is hereby promoted to be an engineer of steamer in this department, at a salary of fourteen hundred dollars per annum, to take effect from 8 o'clock a. m. on the 15th instant. He will report for duty on that date to the commanding officer of the company in which he is now serving.

By order of the board.

HENRY D. PURROY, *President.*

[SEAL.] (Signed) CARL JUSSEN, *Secretary.*

(On margin:) H'dq'rs fire department, New York, April 10, 1894.

A true copy.

JOHN R. SHIELDS,
Ass't Secretary.

105 United States District Court, Southern District of New York.

ROBERT W. WORKMAN
vs.
THE MAYOR, &c., and THE FIRE DEPARTMENT OF THE CITY OF NEW YORK and JAMES A. GALLAGHER. } Opinion.

In admiralty. Collision.

Wing, Shoudy & Putnam, and Mr. Burlingham, for libellant.
William H. Clark, corporation counsel, and James M. Ward, ass't corporation counsel, for mayor, &c.
William L. Findley, for fire department and Gallagher.

BROWN, *J.*:

In the afternoon of July 11, 1893, a fire broke out on the westerly side of South street, about opposite pier 48, East river. For the purpose of assisting in putting out the fire, the fireboat *New Yorker*, belonging to the mayor, aldermen, &c., made her way into the adjoining slip, and in the haste of the occasion she was run into the bow of the barkentine *Linda Park*, causing the latter considerable damage, for which the above libel was filed.

1. For the respondent it is contended, that a less rigid rule of care is applicable in the urgencies of such an occasion, and that considering the circumstances the collision should not be held to have proceeded from negligence. I have no doubt that some acts which might properly be deemed negligent under ordinary circumstances ought not to be held negligent under the stress
106 of fires. But the same general rule is, I think, nevertheless to be applied as the test of what is due care, viz: the care that a man of ordinary prudence would be reasonably supposed to exercise under like circumstances, if the burning property, and the property damaged, had been his own. Making all such allowances, and looking at the facts from that point of view, I still think, considering that the *Linda Park* was properly moored at the dock, that the fireboat *Havemeyer* was already at work in the slip, and the urgency not being extreme, that the running into the *Linda Park* arose through lack of reasonable prudence, and was unnecessary and negligent.

The fireboat belonged to the city, but was under the control and management of the fire department, the heads of which are appointed by the mayor. It is contended that neither the mayor, aldermen, &c., nor the fire department is legally answerable for these damages; not the mayor, &c., it is said, because though owner, it had no control over the management of the vessel; and its duties were not corporate duties. The fire department, it is said, is not liable, because not a corporation capable of being sued, nor having any funds for the payment of a decree.

2. It is certainly a startling proposition, that all the shipping of this port, foreign and domestic, should be at the mercy of the city fireboats, and liable to be negligently run down and sunk at any

moment, without responsibility for damages. By the *maritime law*, both the vessel and the owner are ordinarily liable for such a marine tort. But if the vessel is in the public service, she is not allowed to be withdrawn therefrom by arrest and sale, for reasons of the public convenience (The *Fidelity*, 16 Blatch., 569); or, if the owner, by whose authority and consent she is navigated, can show any other independent legal principal in control of the navigation, such, for example, as a charterer in possession, then the latter only is personally responsible, on the principle of *respondeat superior*. If the legal principal at the time of the injury was the State, that is, if the vessel was strictly in the service of the State, and in
107 the performance of State duties, the State as sovereign not being suable, there is, perhaps, no redress, except by action against the particular individual in fault, and an appeal to the grace and the moral obligation of the sovereign for compensation by legislative act.

But it is obvious that the fireboat *New Yorker*, at the time she inflicted this injury, was not in the service of the State, nor performing any duty of the State. The extinction of fires is not a duty of the State, nor a work which the State has ever undertaken to perform, as a part of its general governmental functions. The State was certainly not the principal in the navigation of the *New Yorker*. Only the corporation or the fire department, as an independent legal entity, could, therefore, be the principal; and if the fire department is not an independent legal entity capable of being sued, as the defendant contends, then, inasmuch as the city corporation owned the vessel, appointed the heads of the fire department, and put the vessel in their charge to be navigated for this very work, the corporation must be responsible, in the view of the maritime law, as the only legal principal in the case. To absolve itself it must show some other independent legal principal in charge of the navigation. The *F. C. Latrobe*, 28 Fed. Rep., 377.

3. The relations of the city corporation and the fire department to each other and to the State, and their respective rights and obligations, are questions of local municipal law, upon which the decisions of the court of appeals, as the highest tribunal of the State, are binding on the Federal courts. (Detroit *v.* Osborne, 135 U. S., 492; Claiborne *v.* Brooks, 111 U. S., 400, 410.)

The court of appeals has made no adjudication as to the status of the fire department of this city under the consolidation act of 1882, or as to the responsibility of the corporation for the acts or negligence of that department.

108 As respects the general responsibility of municipal corporations for torts, the settled law of this State, since the decision of the court of appeals in Conrad *v.* Trustees of Ithaca (16 N. Y., 158), adopting the opinion of Selden, J., in Weet *v.* Brockport (see note 16 N. Y., 163), is that the conferring of corporate powers, privileges and duties, if accepted and acted upon by the corporation, is a sufficient consideration for the implied agreement to exercise such duties with fidelity, and that "whenever the corporation assumes to exercise its corporate powers, it is bound to see

that due care and caution are used to avoid injury to individuals;" do., p. 172. In all subsequent discussions, the decisions have turned essentially upon the question, whether the work or duties in the execution of which the negligence occurred, were properly *corporate duties*, intended to be imposed by law on the corporation; or whether they were duties of a general governmental nature, appropriate to the State and imposed, not upon the corporation itself, but only upon certain *officers* of the corporation, or a department of the corporation, as an independent agency of the State, as the State might have appointed any other individuals, or board, to perform the same duties.

In the former case, the corporation is held liable; in the latter, not. To the latter class, under the acts prior to 1882, belong the duties of the department of charities and correction, in charge of the poor, the criminal and the insane (Maxmilian *v.* The Mayor, &c., 62 N. Y., 160); those of the police department (Swift *v.* The Mayor, 83 N. Y., 535); those of the board of education (Ham *v.* The Mayor, 70 N. Y., 459); in all which cases the corporation was held not liable. See also N. Y. & B. S. M. *v.* City of Brooklyn, 71 N. Y., 580, and Bieling *v.* City of Brooklyn, 120 N. Y., 105–'6. The doctrine of the first three cases was that the duties there in question were a part of the general governmental functions of the State, such duties as the State was accustomed to provide for, and to enforce, by means of some officers, throughout the State, and in the most retired townships, "such duties as are to be performed in every political
109 division of the State, not for its peculiar benefit, but for the public" at large (per Folger, J., in Maxmilian *v.* The Mayor, *supra*, p. 168), and that when the duties are of such a nature, and by the acts in question are "*not laid* upon the *corporate body*," and do not enure to its peculiar benefit, profit or advantage, the imposing of such duties on individual *officers*, or a department of the corporation, is not to be construed as imposing any new duties or liabilities upon the corporation itself, and therefore does not make the corporation legally responsible as principal.

On the other hand, where the nature of the work and of the duties required by the statute to be performed are not of the above character, but are essentially *local*, in which the municipality has a special interest, as distinguished from the public at large, or where the corporation derives therefrom some emolument, profit or advantage, then the imposition of duties upon officers, or a department of the corporation, though not expressly laid upon the corporation itself, is construed as intended to create *corporate duties*, to be performed by the corporation through the designated instrumentalities as the agents of the corporation. Bieling *v.* The City of Brooklyn, 120 N. Y., 105–'6. Such has been held to be the nature of the duties of the street department and the park department in the care of the public streets, the bridges and the sewers; of the dock department, as respects the docks, and of the Croton water commissioners, on the introduction of Croton water, in all which cases the city, on similar statutory provisions, has been held liable. See Ehrgott *v.* The Mayor, &c., 96 N. Y., 271, and the cases there cited; Barney Dump-

ing Co. *v.* The Mayor, 40 Fed. Rep., 50; Philadelphia, &c., *v.* The Mayor, 38 Fed. Rep., 159.

Upon the numerous cases cited and the full discussion of the general subject by Earl, J., in Ehrgott *v.* The Mayor, *supra;* by Folger, J., in Maximilian *v.* The Mayor, *supra;* and by Mr. Justice Hunt, in the case of Barnes *v.* District of Columbia (91 U. S., 540),
110 upon a statute in all respects analogous to the N. Y. statutes prior to the act of 1882 (cited by Earl, J., with evident approval), there seems to me no doubt that the present case belongs to the latter class, and that the corporation is liable for the negligence of the fire department, not only from the local nature of the duties of that department, and the special benefits therefrom to the municipality and the advantages to the corporation, but also from the language of the consolidated act itself. (Laws 1882, ch. 410, sec. 27, 34, 123, 193, 424)

The court of appeals, as above mentioned, has not adjudicated this question under the act of 1882. On the contrary, in the most recent reference to the subject that I have found, viz., in the case of The Fire Department *v.* The Atlas S. S. Company (106 N. Y., 566), though that act in some of its relations was there fully considered in the opinion of Earl, J., the question was left undetermined, as immaterial in that case, "whether it (the fire department) acts independently as a distinct entity with corporate powers, within the doctrine of Maxmilian *v.* The Mayor, 62 N. Y., 160, or whether it acts as an *agency of the city representing it*" (p. 577.) This language is of itself a sufficient answer to the respondent's contention that the exemption of the city from liability for the fire department's acts under the existing statute, has been already adjudged by that court.

It further shows that there was present in the mind of the court the language and the views presented by the same experienced judge in his opinion in Ehrgott *v.* The Mayor, *supra*, in which he said that "although this duty (to keep the streets of the city in repair in the annexed district) is to be exclusively performed by the park commissioners, yet it is a duty which they perform *for it* (the city), and it remains responsible for the condition of its streets."

The duties of the fire department are not, I think, within the ruling of Maximilian *v.* The Mayor; they come rather within the other class of cases, such as streets, sewers, &c. Their nature stamps them as essentially local, and mainly of local concern, like the
111 duties relating to sewers, bridges, and streets; and as being of even more distinctly local concern than the streets, bridges, &c., which, in a measure, are for the use and benefit of all the people of the State. There is no benefit that can be affirmed to result to the corporation from the care of the streets, that does not enure more largely and more directly from the extinction of fires.

In the case of Bates *v.* Westborough, 151 Mass., 184, a State whose courts have pushed farthest the doctrine of municipal exemption, Holmes, J., says: "The interest of towns in the *sewers* is so distinct from that of the public at large, that they are held with reason to the ordinary responsibilities of *owners*." This is manifestly equally

true of the instrumentalities used, and of the work done, in extinguishing fires.

Again, the work of the fire department is not in the least of a general governmental nature, enforced in some form throughout the State for the benefit of the public at large. The extinction of fires is not, and never has been, a State function. It has always been done either by volunteer companies, or by such special local organizations as have been formed and authorized to perform this service; or else by local municipalities or boards similarly authorized in particular localities.

Public governmental duties are such as pertain to the administration of general laws for the benefit and protection of the whole public. "Private or corporate powers are those which the city is authorized to execute for its own emolument, and from which it derives special advantage; or for the increased comfort of its citizens or for the well ordering and convenient regulation of particular classes of the business of its inhabitants; but are not exercised in the discharge of those general and recognized duties which are undertaken by the government for the universal benefit." Per Shipman, J., in Hart *v.* Bridgeport, 13 Blatch., p. 293, Fed. Cas. No. 6149. Greenwood *v.* Town of Westport, 60 Fed. Rep., 571–'2. In the case of Jewett *v.* New Haven (38 Com., 389), Chief Jus. Butler says:

"There is no mode by which to determine whether a power
112 or duty is governmental or not, except to inquire whether it *is in its nature such as all well-ordered governments exercise generally for the good of all*, and one whose exercise all citizens have a *right to require* directly, or by municipal agency; and whether it had *ever been assumed or imposed*, as such, by the government of this State, and would have been exercised by the State, if it had not been by the city. Tested by these criteria, the extinguishment of fires is not a public governmental duty."

Nothing could be more apposite to the present case than these observations in the cases last cited.

The extinction of fires is, moreover, not merely for the benefit of the individual owners; but for the immediate pecuniary *benefit of the corporation* as well, whose yearly revenues of $35,000,000 and upwards come mainly from the annual taxation upon improved property, taxation that amounts on the average to about one-sixth of the entire annual value of the property, which is, more or less, directly saved to the city by the extinction of fires. Here, again, the interest and the advantage to the corporation are more special and peculiar than in the care and preservation of the streets.

The whole course of reasoning in Maximilian *v.* The Mayor, *supra*, plainly, as it seems to me, excludes the work of the fire department from the analogy of that case. The extinction and prevention of fires seem peculiarly appropriate to the localities immediately concerned. The usage and past history of fire companies attest it; so that, in the absence of any indication of a contrary intent in the statute of 1882, there seems to me no doubt that the duties as to fires imposed by the act of 1882 on the fire department of the corporation were designed to be made a *duty of the corporation*, to be per-

formed by that department, as the agent of the city, and representing it, as intimated by Earl, J. See also per Bradley, J., in Bieling *v.* City of Brooklyn, 120 N. Y., 106. In this respect the case of Barnes *v.* District of Columbia, 91 U. S., 540, 545, 547, is precisely analogous, and its reasoning convincing. In that case, every
113 argument here adduced to exempt the city from liability seems to me to be fully met and answered. That case has been repeatedly followed, and, says Mr. Justice Harlan, in District of Columbia *v.* Woodbury, 136 U. S., 450, has "never since been questioned." See, also, per Mr. Justice Bradley, in Metropolitan R. R. *v.* District of Col., 132 U. S., 9, and the learned and exhaustive opinion of Judge Townsend in Greenwood *v.* The Town of Westport, 60 Fed. Rep., 560, 572–4.

4. Aside from the above general considerations, however, the intent of the act of 1882, to make the work of the fire department a duty *of the corporation* seems clearly indicated in the very language of the consolidation act (Laws 1882, chap. 410, secs. 27, 34, 424 *et seq.*). Section 27 of that act declares that "for all purposes, the *local administration and government* of the city of New York, shall continue to be in, and *to be performed by the corporation aforesaid*," *i. e.*: The mayor, aldermen, &c. Sec. 29 invests the board of aldermen with certain legislative powers, and sec. 34 provides that there shall be "the following other departments in said city," naming eleven, of which the fire department is one. The powers and duties of these departments, as defined in the other sections of this act, are all "administrative and governmental;" and almost the whole field of municipal duties is distributed among these various departments.

The different provisions of this act are to be construed harmoniously "and so as not to bring them into conflict with each other." Per Earl, J., in N. Y. Fire Department *v.* Atlas S. S. Co., 102 N. Y., 576. When sec. 27, therefore, declares that "for all purposes, the local administration and government shall *be performed by the corporation, it* must mean that every "*local*" administrative and governmental duty found distributed among any of the departments afterwards named in the same act, is intended to be made a corporate duty, "to be performed by the corporation." The only duties that can be excepted from the effect of this provision are such administrative and governmental duties as are not "local,"
114 and even if that exception can properly and consistently with the language of the act be made to include such duties as have been previously recognized as State functions, and enforced as such by the State in one form or another throughout the State, such as the work of the departments of charities and correction, of the police, and of the board of education—duties which in that sense are not "local"—still, it is manifest, that the work and the duties of the fire department, in the inspection and regulation of buildings in the city of New York, in order to prevent fires, as well as its work of extinguishing fires, are not, and never have been of that general nature; but that they are strictly "local," and that consequently by the language of sec. 27, the duties of the fire department

are by the very terms of the act of 1882, "laid upon the corporation," as corporate duties.

The few cases as to the status of the New York fire department cited for the defendant all arose prior to the act of 1882, and under different statutes. O'Meara *v.* Daly, 1 Daly, 425, arose in 1862, when the fire department was a distinct corporation. (The People *v.* Pinckney, 32 N. Y., 377, 389–392.) The case of Woolbridge *v.* The Mayor, &c., 49 How. Prac., 67, arose under the Metropolitan fire department, also a distinct corporation (1 Sweeny, 224). In Terhune *v.* City of Rochester, 88 N. Y., 247, the case was of acts *ultra vires*, and decided on that ground. The Massachusetts cases are no guide here, because the doctrine of municipal responsibility there is essentially different from that of New York.

The intent of the act of 1882 being sufficiently clear from its language to make the work of the New York fire department a *corporate duty*, there is no occasion and no room for the application of principles of legal "construction," such as are appropriate upon *ambiguous or doubtful statutes*, in order to convert that department, which in itself is a mere branch of the corporation, into an independent legal entity, acting as an agency of the State, instead of being an agency of the corporation.

115 The decisions of the court of appeals are clear and uniform, as I understand them, that as soon as it appears that the duties in question "are laid upon the city, or rest upon the corporation," the city is answerable for negligence in performing them. So says Folger, J., in Maxmilian *v.* The Mayor, 62 N. Y., 169. To the same effect are Kennedy *v.* The Mayor, 73 N. Y., 365, 368; Ham *v.* The Mayor, 70 N. Y., 464; Behrberg *v.* The Mayor, 91 N. Y., 142, 145; Ehrgott *v.* The Mayor, 96 N. Y., 272–'5; Bieling *v.* City of Brooklyn, 120 do., 98, 106; The People *v.* Sherwood (per Earl, J.), 129 N. Y., 368.

For these reasons the libelant is entitled to decree against The Mayor, Aldermen, etc., and the defendant Gallagher, with costs.

Dated August 15, 1894.

A. B.

At a stated term of the district court of the United States for the southern district of New York, held in the court-rooms, in the city of New York, on the 28th day of August, 1894.

Present: Honorable Addison Brown, judge.

ROBERT W. WORKMAN
vs.
THE MAYOR, ALDERMEN, AND COMMONALTY OF THE CITY OF NEW YORK, The Fire Department of the City of New York, and James A. Gallagher, Impleaded.

It having been referred to a commissioner of this court to ascertain the damages sustained by the libelant, and said damages
116 having been agreed upon by the libellant and the respondents, The Mayor, Aldermen and Commonalty of the City of

New York, and James A. Gallagher, at the sum of $690.36, without a reference, now, on motion of Wing, Shoudy & Putnam, proctors for the libellant, it is—

Ordered, adjudged and decreed that the libellant above named recover herein against the respondents, The Mayor, Aldermen and Commonalty of the City of New York and James A. Gallagher the said sum of $690.36 as damages, and the further sum of $48.32, interest thereon from the 23rd day of June, 1893, and the further sum of $77.16, costs as taxed, making in all the sum of $815.84.

And it is further ordered, adjudged and decreed that as between the respondent, The Mayor, Aldermen and Commonalty of the City of New York, and the respondent, James A. Gallagher, said sum of $815.84 so adjudged to the libellant with the accruing interest be paid by the said respondents in equal parts, one-half by each; and that either of said halves, or any part thereof, which the libellant may not be able to collect from or enforce against either of said respondents, be paid by the other of said respondents.

And it is further ordered, adjudged and decreed that as against the respondent, The Fire Department of the City of New York, the libel herein be and the same hereby is dismissed.

And it is further ordered that unless this decree be satisfied or an appeal therefrom be taken within the time and in the manner prescribed by the rules and practice of this court, the libelant have execution to enforce satisfaction hereof.

ADDISON BROWN.

(Endorsed:) Final decree. Filed Aug. 30, 1894.

117 District Court of the United States for the Southern District of New York.

ROBERT W. WORKMAN, Libelant,
against
THE MAYOR, ALDERMEN, AND COMMONALTY OF THE City of New York, The Fire Department of the City of New York, James A. Gallagher, Respondents. } In Admiralty.

GENTLEMEN: Please take notice that The Mayor, Aldermen and Commonalty of the City of New York, respondents in the above-entitled cause, hereby appeal to the next United States circuit court of appeals for the second circuit from so much of the final decree dated herein on the 28th day of August, 1894, and filed in the office of the clerk of the district court for the southern district of New York on the said 28th day of August, 1894, as orders, adjudges and decrees that the libellant recover against the respondents, The Mayor, Aldermen and Commonalty of the City of New York and James A. Gallagher, the sum of $690.36 as damages; and the further sum of $48 32 as interest thereon; and the further sum of $77.16, costs, making in all the sum of $815.84, and from so much of the said decree as further orders, adjudges and decrees, that the

Mayor, Aldermen and Commonalty of the City of New York and the respondent, James A. Gallagher, pay the said sum of $815.84, so adjudged to the libellant with the accruing interest in equal parts, one-half by each, and that either of said halves or any part thereof which the libellant may not be able to collect from or enforce
118 against either of the said respondents be paid by the other of said respondents.

Dated New York, September 4, 1894.

Yours, &c., WILLIAM H. CLARK,
Counsel to the Corporation, Proctor for Respondents The Mayor, Aldermen and Commonalty of the City of New York.

To Samuel H. Lyman, Esq., clerk of the United States district court for the southern district of New York.

To Wing, Shoudy & Putnam, Esqs., proctors for libellant, 45 William street, N. Y. city.

(Endorsed:) Notice of appeal of the Mayor, etc. Filed Sept. 6th, 1894.

119 United States Circuit Court of Appeals for the Second Circuit.

ROBERT W. WORKMAN, Libelant and Appellee,
against
THE FIRE DEPARTMENT OF THE CITY OF NEW York and James A. Gallagher, Respondents, and The Mayor, Alderman, and Commonalty of the City of New York, Respondent and Appellant. } In Admiralty.

Assignment of Errors.

The respondent and appellant, The Mayor, Aldermen, and Commonalty of the City of New York, on its appeal referred to in the annexed petition assigns the following as errors:

1. The court below erred in entering the decree of August 28th, 1894, that the libelant and appellee recover the amount of his damage, with interest thereon from the 23d day of June, 1893, together with the sum of $77.16, his costs.

2. The court below erred in entering the decree of August 28, 1894, that the libelant and appellee recover the amount of his damage, with interest thereon from the 23d day of June, 1893, and the sum of $77.16, his costs, as taxed against the respondents, The Mayor, Alderman, and Commonalty of the City of New York and James A. Gallagher.

3. The court below erred in adjudging and decreeing in the
120 decree of August 28th, 1894, that as between the respondents, The Mayor, Aldermen, and Commonalty of the City of New York and James A. Gallagher, the damages so adjudged to the

libelants and appellee with the accruing interest thereon be paid by the said respondents in equal parts, one-half by each, and that either of said halves or any part thereof which the libelant may not be able to collect from or enforce against either of said respondents be paid by the other of said respondents.

4. That the court below erred in entering the decree of August 28th, 1894, that the libelant and appellee recover any sum by way of damage, interest and costs, against the respondent and appellant, The Mayor, Aldermen, and Commonalty of the City of New York.

5. That the court below erred in the determining that there was any fault or negligence on the part of the respondents and appellants, The Mayor, Aldermen, and Commonalty of the City of New York.

6. That the said final decree of the said district court entered on the 28th day of August, 1894, is contrary to law in awarding any sum by way of damage to the libelant as against the respondent and appellant, The Mayor, Aldermen and Commonalty of the City of New York.

7. That the said final decree of the said district court entered on the 28th day of August, 1894, is contrary to the evidence in awarding to the libelant any sum whatever by way of damages.

8. That the said final decree of the said district court, entered on the 28th day of August, 1894, is contrary to the evidence in awarding to the libelant any sum whatever by way of damage as against the respondent and appellant, The Mayor, Aldermen, and Commonalty of the City of New York.

9. That the said final decree of the said district court,
121 entered on the 28th day of August, 1894, is against the weight of the evidence in awarding to the libellant any sum whatever by way of damage.

10. That the said final decree of the said district court, entered on the 28th day of August, 1894, is against the weight of the evidence in awarding to the libellant any sum whatever by way of damage against the respondent and appellant, The Mayor, Aldermen and Commonalty of the City of New York.

11. The said district court erred in holding, as a conclusion of fact, that the respondent and appellant, The Mayor, Aldermen and Commonalty of the City of New York, and the respondent, James A. Gallagher, were both of them in fault.

12. The said district court erred in holding, as a conclusion of law, that either the said Mayor, Aldermen and Commonalty of the City of New York, respondent and appellant, or the respondent, James A. Gallagher, were in fault.

13. The said district court erred in holding as a conclusion of law that there was any liability on the part of the respondent and appellant, The Mayor, Alderman and Commonalty of the City of New York, to the libellant herein.

14. The said district court erred in holding as a matter of law that the libellant was entitled to recover any sum whatever against

the respondent and appellant, The Mayor, Aldermen and Commonalty of the City of New York.

Dated New York, September 12th, 1894.

WILLIAM H. CLARK,
Counsel to the Corporation, Proctor for Respondent and Appellant, The Mayor, Aldermen and Commonalty of the City of New York,
2 Tryon Row, New York City, N. Y.

(Endorsed:) Assignment of error-. Filed Sept. 14, 1894

122 District Court of the United States for the Southern District of New York.

ROBERT W. WORKMAN, Libellant,
against
THE MAYOR, ALDERMEN, AND COMMONALTY OF THE City of New York, The Fire Department of the City of New York, and James A. Gallagher, Respondents. } In Admiralty.

GENTLEMEN: Please take notice, that James A. Gallagher, respondent in the above-entitled cause, hereby appeals to the next United States circuit court of appeals for the second circuit from so much of the final decree, dated herein on the 28th day of August, 1894, and filed in the office of the clerk of the district court for the southern district of New York, on the said 28th day of August, 1894, as orders, adjudges and decrees that the libellant recover against the respondents, The Mayor, Aldermen and Commonalty of the City of New York and James A. Gallagher, the sum of $630.36, as damages, and the further sum of $48.32, as interest thereon, and the further sum of $77.16, costs, making in all the sum of $815.84, and from so much of the said decree as further orders, adjudges and decrees that the Mayor, Aldermen and Commonalty of the City of New York and the respondent, James A. Gallagher, pay the said sum of $815.84 so adjudged to the libelant with the accruing interest in equal parts, one-half by each, and that either of said halves or any part
123 thereof which the libelant may not be able to collect from or enforce against either of the said respondents, be paid by the other of said respondents.

Dated New York, September 4, 1894.

Yours, &c., GEORGE L. STERLING,
Proctor for Respondent James A. Gallagher.

To Samuel H. Lyman, Esq., clerk of the United States district court for the southern district of New York.

To Wing, Shoudy & Putnam, Esqs., proctors for libellant, 45 William street, N. Y. city.

(Endorsed:) Notice of appeal of James A. Gallagher. Filed Sept. 6th, 1894.

124 United States Circuit Court of Appeals for the Second Circuit.

ROBERT W. WORKMAN, Libelant and Appellee, *against* THE MAYOR, ALDERMEN, AND COMMONALTY OF the City of New York, The Fire Department of the City of New York, Respondents, and James A. Gallagher, Respondent and Appellant.	In Admiralty.

Assignment of Errors.

The respondent and appellant, James A. Gallagher, on his appeal referred to in the annexed petition, assigns the following as errors:

1. The court below erred in entering the decree of August 28th, 1894, that the libelant and appellee recover the amount of his damage, with interest thereon from the 23d day of June, 1893, together with the sum of $77.16, his costs.

2. The court below erred in entering the decree of August 28, 1894, that the libelant and appellee recover the amount of his damage, with interest thereon from the 23d day of June, 1893, and the sum of $77.16, his costs as taxed against the respondents, The Mayor, Aldermen, and Commonalty of the City of New York and James A. Gallagher.

3. The court below erred in adjudging and decreeing in
125 the decree of August 28, 1894, that as between the respondents, The Mayor, Aldermen and Commonalty of the City of New York and James A. Gallagher, the damages so adjudged to the libelants and appellee with the accruing interest thereon be paid by the said respondents in equal parts, one-half by each, and that either of said halves or any part thereof which the libelant may not be able to collect from or enforce against either of said respondents be paid by the other of said respondents.

4. That the court below erred in entering the decree of August 28, 1894, that the libelant and appellee recover any sum by way of damage, interest and costs, against the respondent and appellant, James A. Gallagher.

5. That the court below erred in the determining that there was any fault or negligence on the part of the respondent and appellant, James A. Gallagher.

6. That the said final decree of the said district court, entered on the 28th day August, 1894, is contrary to law in awarding any sum by way of damage to the libelant as against the respondent and appellant, James A. Gallagher.

7. That the said final decree of the said district court, entered on the 28th day of August, 1894, is contrary to the evidence in awarding to the libelant any sum whatever by way of damage.

8. That the said final decree of the said district court, entered on the 28th day of August, 1894, is contrary to the evidence in awarding to the libelant any sum whatever by way of damage as against the respondent and appellant, James A. Gallagher.

9. That the said final decree of the said district court, entered on the 28th day of August, 1894, is against the weight of the evidence in awarding to the libelant any sum whatever by way of damage.

126 10. That the said final decree of the said district court, entered on the 28th day of August, 1894, is against the weight of the evidence in awarding to the libelant any sum whatever by way of damage against the respondent and appellant, James A. Gallagher.

11. The said district court erred in holding as a conclusion of fact that the respondent, The Mayor, Aldermen and Commonalty of the City of New York and the respondent and appellant, James A. Gallagher, were both of them in fault.

12. The said district court erred in holding as a conclusion of law that either the said Mayor, Aldermen and Commonalty of the City of New York, respondent, or the respondent and appellant, James A. Gallagher, were in fault.

13. The said district court erred in holding as a conclusion of law that there was any liability on the part of the respondent and appellant, James A. Gallagher, to the libelant herein.

14. The said district court erred in holding as a matter of law that the libelant was entitled to recover any sum whatever against the respondent and appellant, James A. Gallagher.

Dated New York, September 12, 1894.

GEORGE L. STERLING,
Proctor for Respondent and Appellant, James A. Gallagher, No. 2 Tryon Row, N. Y.

JAMES M. WARD, *Of Counsel.*

(Endorsed:) Assignment of errors. Filed Sept. 12, 1894.

127 UNITED STATES OF AMERICA, } ss:
Southern District of New York, }

ROBERT W. WORKMAN, Libellant and Appellee,
vs.
THE MAYOR, ALDERMEN, AND COMMONALTY OF THE CITY OF NEW YORK and JAMES A. GALLAGHER, Impleaded with The Fire Department of the City of New York, Respondents and Appellants.

I, Samuel H. Lyman, clerk of the district court of the United States of America, for the southern district of New York, do hereby certify that the foregoing is a correct transcript of the record of the district court in the above-entitled cause, made up pursuant to rule No. 4 in admiralty of the United States circuit court of appeals, for the second circuit.

In testimony whereof, I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the south-
[SEAL.] ern district of New York, this 4th day of October, in the year of our Lord one thousand eight hundred and ninety-

four, and of the independence of the said United States the one hundred and nineteenth.

SAM'L H. LYMAN, *Clerk.*

128 U. S. Circuit Court of Appeals, Second Circuit.

WORKMAN, Appellee,
vs.
THE MAYOR, ALDERMEN, AND COMMONALTY OF THE CITY OF NEW YORK *et al.*, Appellants. } Opinion.

WALLACE, *C. J.:*

The evidence in the record adequately supports the conclusion of the court below that the injuries caused by the libelant's vessel by the impact of the fireboat were caused by the negligent manner of the fireboat while the latter was trying to reach a convenient location to play upon a burning building near the pier at which the libelant's vessel was moored. The case then presents the legal question whether the municipal corporation, The Mayor, &c., of the City of New York, is responsible for the negligence of the members of its fire department, committed while attempting to extinguish a fire within the corporate limits.

That the suit is brought in a court of admiralty instead of a common-law court, and that the negligence consisted in the improper navigation of the vessel, are considerations which cannot affect the conclusion. Although the vessel may have been the direct instrumentality, the offending thing, in effecting a marine tort, neither the vessel nor her owners can be held responsible by reason of that circumstance alone. The common case of a collision of a vessel in tow of another, and a third vessel, produced by the negligence of the towing vessel, is a sufficient illustration. If the vessel in tow is free from negligence, neither she nor her owner is liable for the injury. Accountability, either personal or on the
129 principle of agency, must concur with injury to give a cause of action in any tribunal, equally in admiralty as at common law. If the city of New York would not have been liable if one of its steam fire-engines, manned by the members of the fire department, had, by want of due care, while endeavoring to reach a conflagration, injured an individual or his property, it cannot be liable in the present suit.

It is familiar law that the officers selected by a municipal corporation to perform a public service for the general welfare of the inhabitants or the community, in which the corporation has no private interest, and from which it derives no special benefit or advantage in its corporate capacity, are not to be regarded as the servants or agents of the municipality, and for their negligence or want of skill in cannot be held liable. This is so, notwithstanding such officers derive their appointment from, and are paid by, the corporation itself. In selecting and employing them the municipality merely performs a political or governmental function; the duties

entrusted to them do not relate to the exercise of corporate powers; and hence they are the agents or servants of the public at large. Upon this principal it has uniformly been decided by the courts that municipal corporations are not liable for the negligence or wrongful acts of the officers of the police or health departments, committed in the course of their ordinary employment. Unless the duties of the officers of the fire department are of a different complexion, and they are the servants of the municipality because they are engaged in performing one of its corporate functions, the same principle must extend immunity to the municipality for the negligent acts of these officers and their subordinates.

A municipal corporation, like a private corporation, is liable to any person who has sustained injury in consequence of its neglect to perform a corporate duty; but because the duties of municipal corporations in respect to protecting its citizens from the dangers of fires are governmental, and not corporate, they are not liable to the owner of property injured by fire, in consequence of their
130 neglect to provide suitable fire apparatus; or to provide and keep in repair public cisterns, or the failure of their firemen to use proper efforts. Wheeler *v.* Cincinnati (19 Ohio St., 19); Batch *v.* Covington (17 B. Mon., 722); Brinkmeyer *v.* Evansville (29 Ind., 187); Waitman *v.* Washington (1 Black, 39, 49); Kies *v.* Erie City (135 Pa. St., 144); Heller *v.* Sedalia (53 Mo., 159); Robinson *v.* Evansville (37 Ind., 334). So uniform and numerous are the authorities against the proposition that a municipal corporation is liable for the negligent acts of these officers that to discuss it as an original question would seem to be inappropriate. In one of the most recent text books on the law of municipal corporations the rule is thus stated: "Municipal corporations are not liable for the negligence of their firemen, although they may be appointed and removed by the city, and the performance of their duties are wholly subject to its control." Tiedeman on Municipal Corporations, sec. 333. A reference to the following adjudicated cases, in which the rule has been applied, will suffice to show how universally it obtains in the courts of this country: Hafford *v.* New Bedford (16 Gray, 297), in which a hose carriage on its way to a fire ran over the plaintiff; Fisher *v.* Boston (104 Mass., 87), in which the injury was caused from the bursting of hose; Burrill *v.* Augusta (78 Maine, 118), in which a horse was frightened by escaping steam from an engine left in the street; Wild *v.* Patterson (47 N. J. Law, 406), in which the injury was caused from a defect in the brake of an engine; Hayes *v.* Oshkosh (33 Wis., 314), in which damage was sustained by the negligent management of an engine in allowing the escape of sparks; Wilcox *v.* The City of Chicago (107 Ill., 334), a case of collision with a hook and ladder wagon; Edgerly *v.* Concord, (59 N. H., 78), a case of the negligent testing of a hydrant; Howard *v.* San Francisco (51 Cal., 52), a case of collision with an engine; McKenna *v.* St. Louis (6 Mo. App., 220), a case of negligent management of hose carriage; Jewett *v.* New Haven (38 Conn., 368), a similar case; Grube *v.* St. Paul (34 Minn., 402), a similar case;
131 Welsh *v.* Rutland (56 Vt., 228), a case of injury of slipping

on ice caused by the escape of water from fire-hydrant; Greenwood *v.* Louisville (13 Bush., 226), in which the plaintiff was negligently run over on the sidewalk by an engine; Freeman *v.* Philadelphia (7 W. N. C. Pa., 45), and Knight *v.* Philadelphia (15 W. N. C. Pa., 307), cases of careless driving of fire-engine; Dodge *v.* Granger (17 R. I., 664), a case of injury by the negligent projection of a ladder from an engine-house; Simon *v.* Atlanta (67 Ga., 618), a case of injury from a rope stretched across the street by the fire department.

It is quite immaterial that the duties of these officers are defined and the offices created by the charter or organic law of the municipality; the test of corporate liability for the acts of the officers of the municipality depends upon the nature of the duties with which they are charged; if these, being for the general good of the public as individual citizens, are governmental, they act for the State, if they are those which primarily and legitimately devolve upon the municipality itself, they are its agents. Thus in Mead *v.* New Haven (40 Conn., 72) the city, pursuant to its charter, appointed an inspector of steam boilers and passed a by-law which imposed a penalty on any person who should use a boiler without having it tested by an inspector. In a suit for the negligent act of the inspector the court said: "The duty of inspection of boilers is governmental. The object of the inspection is to protect all citizens from danger who may come in contact with the boiler, or may be exposed in any way to danger from its unsafe condition. The city, as such, has no pecuniary or individual or private interest in the matter, and although the power of the city over the subject is conferred by the charter, and not by the general law, yet the city must, we think, be regarded as the agent of the government, and acting for the State, and not for itself, in making the appointment of inspectors, and therefore not liable for the inspector's negligence." The fire department of the city of New York derives its origin and defined powers from the same organic law as do the commis-
132 sioners of charities and correction, and the department of public instruction, and the officers of each are constituted by the appointment of executive officers of the city. Of the commissioners of charities and correction the court of appeals said in Maximilian *v.* The Mayor (62 N. Y., 160): "It is seen at once that the powers and duties of the commissioners of charities and correction are not to be exercised and performed for the especial benefit of the defendant. It gets no emolument therefrom nor any good as a corporation. It is the public, or individuals as members of the commonalty, who are interested in the due exercise of these powers, and the proper performance of their duties. * * * These chief officers, though in a sense its officers, as having no power unless after appointment by it, and as mainly confined within its territorial boundaries are yet officers of the State government, in the sense that they perform its functions within a designated political division of the State." Of the department of public instruction the court of appeals said in Ham *v.* The Mayor (70 N. Y., 459): "Although formally constituted a department of the municipal government the

duties which it was required to discharge were not local or corporate, but related and belonged to an important branch of the administrative department of the State government." It was held in each of these cases that the city of New York was not liable for the negligence of an employee of one of these departments. And in Thompson *v.* The Mayor (52 Super. Ct. Rep., 427), it was held that the city was not liable for the negligent conduct of the employees of the fire department, as at present constituted.

We entertain no doubt that the city was not liable for the negligent management of the fireboat in the present case, and that the libel against the mayor, &c., should have been dismissed by the district court.

It is accordingly ordered that the cause be remitted to the district court with instructions to dismiss the libel against the mayor,
133 &c., with costs of this court, and of the district court, and to affirm the decree against the respondent Gallagher with costs.

(Endorsed:) U. S. cir. ct. of appeals, second cir. Workman, appellee, *v.* The Mayor, Aldermen & Commonalty of the City of New York, *et al.*, appellants. Wallace, C. J. Filed April 16, 1895.

At a stated term of the United States circuit court of appeals for the second circuit, held in the court-rooms of said court in the post-office building in the city of New York, on the 6th day of May, 1895.

Present: Hon. William J. Wallace, Hon. E. Henry Lacombe, Hon. Nathaniel Shipman, judges.

ROBERT W. WORKMAN, Libellant and Appellee,
against
THE MAYOR, ALDERMEN, AND COMMONALTY OF THE CITY OF New York, James A. Gallagher, Impleaded with the Fire Department of the City of New York, Respondents and Appellants.

This cause having come on to be heard, on appeal by the appellants and respondents, The Mayor, Aldermen and Commonalty of the City of New York and James A. Gallagher, from each and every part of the decree of the district court of the United
134 States for the southern district of New York, entered in the above cause in the clerk's office of the district court of the United States for the southern district of New York on the 28th day of August, 1894, except that portion of said decree which orders and adjudges that as against the respondents in this cause, The Fire Department of the City of New York, the libel herein be dismissed, and after hearing David J. Dean, Esq., advocate for the appellants, in support of the said appeal, and Harrington Putnam, Esq., advocate for the appellee, in opposition thereto, and due delibe... on being had, now, on motion of Francis M. Scott, Esq., proctor for the respondents and appellants, it is—

Ordered that the said decree of the district court for the southern

district of New York be, and the same hereby is, reversed except as regards the provisions thereof relating to the fire department of the city of New York, and as to the appellant, James A. Gallagher, and that as to said James A. Gallagher the decree of said district court is affirmed with costs, and it is—

Further ordered that a mandate issue to the said district court to proceed in accordance with the opinion of this court.

W. J. W.
E. H. L.
N. S.

(Endorsed:) Order for mandate. Filed May 6, 1895.

135 United States Circuit Court of Appeals for the Second Circuit.

ROBERT W. WORKMAN, Libellant and Appellee,
against
THE MAYOR, ALDERMEN, AND COMMONALTY OF THE CITY OF New York and James A. Gallagher, Respondents and Appellants.

The libellant and appellee in the above cause respectfully petitions and requests this court to certify to the Supreme Court of the United States, for its decision, the following questions:

1. Whether the city of New York is liable for the negligent navigation of a fireboat in respect to a collision with a British vessel, which at the time is moored alongside a wharf within the municipality.

2. Whether the liability of a municipal corporation for a wrongful collision on navigable waters by a city fireboat is to be determined by the municipal law and statutes of the State of New York, or by the principles of the maritime law.

3. Whether the admiralty recognizes any exemption in favor of a municipality owning and operating a vessel upon navigable waters for the purpose of extinguishing fires.

4. Whether the liability of a municipal vessel-owner for negligent collision depends in the admiralty upon the doctrine of *respondeat superior*, or is incidental to ownership, even if the pilot in charge be not the servant of the owner.

136 5. Whether the rules of the State common-law courts, in respect to a trespass by a fire-engine on land, are to be followed by the Federal courts, sitting in admiralty, in determining the liability of a city for maritime torts by a steam fireboat.

6. Whether a State has the power to authorize a municipality to use a steam vessel in navigable waters, and exempt the municipal owner from the liabilities imposed on other vessel-owners?

The appellee and libellant further shows, in support of his application, that these questions are of great importance, and have never been passed upon by the Supreme Court.

That in the learned opinion of this court no decision in the admiralty is cited, and the only Federal case mentioned (Weightman

v. Washington, 1 Black, 39) was an action upon the case at common law in which the plaintiff was successful, by writ of error, in reversing a judgment for the defendant.

In the case of the *China*, 7 Wallace, 68, the Supreme Court said: "The maritime law as to the position and powers of the master and the responsibility of the vessel *is not derived from the civil law of master and servant, nor from the common law.*" * * * "The remedy of the damaged vessel, if confined to the culpable pilot, would frequently be a mere delusion. He would often be unable to respond by payment, especially if the amount recovered were large. Thus, where the injury were greatest, there would be the greatest danger of a failure of justice."

As there is no controversy as to the facts, and the libellant's vessel is admitted to have been blameless, the libellant should be permitted to have the liability of the city determined by the decision of the highest court.

The libellant further shows that similar actions are pending in other districts, and that a question of such importance and far-reaching results should be decided by the Supreme Court; so
137 that thereby the conflicting decisions of different judicial districts may be reduced to a uniform rule in the courts of admiralty.

ROBERT W. WORKMAN,
By WING, SHOUDY & PUTNAM,
Proctors.

Dated April 30th, 1895.

SIRS: Please take notice that we shall present the foregoing petition to the judges of the United States circuit court of appeals for the second circuit, at the court-rooms, in the city of New York, on Monday, May 6th 1895, at 10.30 o'clock a. m., and apply for the certificate prayed for therein, and for such other or further relief in the premises as may be proper.

Dated April 30th, 1895.

WING, SHOUDY & PUTNAM,
Proctors for Petitioner.

To Francis M. Scott, Esq., counsel to the corporation; George L. Sterling, Esq., proctor for Gallagher, respondents and appellants.

Decision on Motion for Certificate.

WORKMAN
vs.
THE MAYOR, &C.

Petition for certification to Supreme Court denied.
May 6, 1895.

138 UNITED STATES OF AMERICA, *Southern District of New York*, } *ss:*

I, James C. Reed, clerk of the United States circuit court of appeals for the second circuit, do hereby certify that the foregoing pages, numbered from 1 to 137, inclusive, contain a true and complete transcript of the record and proceedings had in said court, in the case of Robert W. Workman, libellant, appellee, *v.* The Mayor, Aldermen and Commonalty of the City of New York, and James A. Gallagher, respondents, appellants (impleaded with the Fire Department of the City of New York), as the same remain of record and on file in my office.

In testimony whereof, I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, in the second circuit, this tenth day *day* of May, in the year of our Lord one thousand eight hundred and ninety-five, and of the Independence of the said United States the one hundred and nineteeth.

[SEAL.]

[Seal United States Circuit Court of Appeals, Second Circuit.]

JAMES C. REED, *Clerk.*

139 UNITED STATES OF AMERICA, *ss:*

Seal of the Supreme Court of the United States.

The President of the United States of America to the honorable the judges of the United States circuit court of appeals for the second circuit, Greeting:

Being informed that there is now pending before you a suit in which The Mayor, Aldermen, and Commonalty of the City of New York and James A. Gallagher are appellants and Robert W. Workman is appellee, which suit was removed into the said circuit court of appeals by virtue of an appeal from the district court of the United States for the southern district of New York, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said circuit court of appeals and removed into the Supreme Court of the United States,

140 do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 28th day of May, in the year of our Lord one thousand eight hundred and ninety-five.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

141 [Endorsed:] Supreme Court of the United States. No. 1022, October term, 1894. The Mayor, &c., of the City of New York *et al. vs.* Robert W. Workman. Writ of certiorari.

UNITED STATES OF AMERICA, *Southern District of New York,* } ss:

I, James C. Reed, clerk of the United States circuit court of appeals for the second circuit, by virtue of the foregoing writ of certiorari and in obedience thereto do hereby certify that the following page, numbered four, contains a true and complete transcript of the record and proceedings had in said court in the cause entitled Robert W. Workman, libellant, appellee, against The Mayor, Aldermen, and Commonalty of the City of New York and James A. Gallagher, respondents, appellants, as the same remain of record and on file in said office.

In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, in the second circuit, this fifth day of June, in the year of our Lord one thousand eight hundred and ninety-five, and of the Independence of the United States the one hundred and nineteenth.

Seal United States Circuit Court of Appeals, Second Circuit.

JAMES C. REED, *Clerk.*

142 United States Circuit Court of Appeals, Second Circuit of New York.

ROBERT W. WORKMAN
against
THE MAYOR, ALDERMAN, AND COMMONALTY OF THE CITY OF NEW YORK and JAMES A. GALLAGHER.

It is hereby stipulated that the record heretofore certified by the clerk of this court to the Supreme Court of the United States, on the application of the libelant for a writ of certiorari, together with this stipulation, stand as the return to the writ issued out of said Supreme Court May 28th, 1895.

Dated New York, May 29, 1895.

WING, SHOUDY & PUTNAM,
Proctors for Libellant.
FRANCIS M. SCOTT,
Proctor for Respondent The Mayor, &c.
GEORGE L. STERLING,
Proctor for Jas. A. Gallagher.

(Endorsed:) United States circuit court of appeals, second circuit. Filed June 5, 1895. James C. Reed, clerk.

143 [Endorsed:] Case No. 15,906. Supreme Court U. S., October term, 1896. Term No., 276. The Mayor, Aldermen, &c., of New York, app'ts, *vs.* Robert W. Workman. Writ of certiorari and return. Filed June 7, 1895.

3

Office Supreme Court
FILED
MAY 20 18
JAMES H. McKENN

SUPREME COURT OF THE UNITED STATES

In the matter of the petition

of

ROBERT W. WORKMAN for a writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit

PETITION

WING, SHOUDY & PUTNAM

Proctors for Petitioner

UNITED STATES CIRCUIT COURT OF APPEALS 1

FOR THE SECOND CIRCUIT.

ROBERT W. WORKMAN,
Libellant and Appellee,

AGAINST

THE MAYOR, ALDERMEN AND COMMONALTY OF THE CITY OF NEW YORK, and JAMES A. GALLAGHER, 2
Respondents and Appellants.

Notice is hereby given that upon the petition of the libellant above named, verified the 14th day of May, 1895, and upon all the pleadings and proceedings herein, we shall, on Monday, the 20th day of May, 1895, at the opening of the Court on that day, or as soon 3 thereafter as counsel can be heard, submit a motion, a copy of which is herewith served upon you, to the Supreme Court of the United States, at the Capitol, in the City of Washington.

New York, May 14th, 1895.

WING, SHOUDY & PUTNAM,
Proctors for Libellant.

To FRANCIS M. SCOTT, ESQ.,
Proctor for Respondents, the Mayor, Aldermen and Commonalty of the City of New 4
York.

GEORGE L. STERLING, ESQ.,
Proctor for Respondent Gallagher.

5

To the Supreme Court of the United States:

The petition of Robert W. Workman for a writ of *certiorari* to the Judges of the United States Circuit Court of Appeals for the Second Circuit to bring before the Supreme Court of the United States a certain suit in admiralty wherein he is libellant against the Mayor, Aldermen, and Commonalty of the City of New York, impleaded with James A. Gallagher, respondents, respectfully shows:

6 FIRST.—At all the times hereinafter mentioned the libellant was a resident of Belfast, Ireland, and the owner of the British barkentine *Linda Park*.

SECCND.—On the 11th day of June, 1893, while said vessel was lying at pier 48, East River, in the City of New York, properly moored to the pier, where she had a right to be, the fireboat *New Yorker*, under the command of the respondent Gallagher, entered the
7 slip at about 4.30 P. M. for the purpose of assisting another fireboat in putting out a fire on shore near the pier, and negligently collided with said barkentine, to the libellant's damage in the sum of $690.36.

THIRD.—On the 27th day of July, 1893, the libellant filed his libel in the District Court of the United States for the Southern District of New York, against the respondents, the Mayor, Aldermen, and Commonalty of the City of New York, to recover the damages sustained by said collision. Thereafter the libel was amended
8 so as to make the Fire Department of the City of New York and James A. Gallagher, the pilot of the fireboat *New Yorker*, parties respondent.

FOURTH.—The Mayor, Aldermen, and Commonalty of the City of New York were, at the times herein mentioned, the owner of the fireboat *New Yorker*, which was under the exclusive direction and in the keeping and custody of the Fire Department of said city.

FIFTH.—The District Court dismissed the libel as to 9
the Fire Department, and held the respondents, the Mayor, etc., and the pilot Gallagher responsible for the damages sustained by the collision, and a decree was accordingly entered in the District Court on the 28th day of August, 1894, in favor of the libellant for $815.84, including interest and costs. The District Judge held that "by the maritime law both the vessel and the owner are ordinarily liable for such a marine tort. But if the vessel is in the public service she is not allowed to be withdrawn therefrom by arrest and 10
sale for reasons of the public convenience" (The *Fidelity*, 16 Blatch., 569). * * *

"But it is obvious that the fireboat *New Yorker*, at the time she inflicted this injury, was not in the service of the State, nor performing any duty of the State. The extinction of fires is not a duty of the State, nor a work which the State has ever undertaken to perform, as a part of its general governmental functions. The State was certainly not the principal in the navigation of the *New Yorker*. Only the corporation or the Fire Department, as an independent 11
legal entity, could, therefore, be the principal; and if the Fire Department is not an independent legal entity capable of being sued, as the defendant contends, then, inasmuch as the City Corporation owned the vessel, appointed the heads of the Fire Department, and put the vessel in their charge to be navigated for this very work, the corporation must be responsible, in the view of the maritime law, as the only legal principal in the case. To absolve itself it must show some other independent legal principal in charge of the navigation. The *F. C. Latrobe*, 28 Fed. Rep., 377."
12

The District Judge made a careful review of the decisions of the Court of Appeals of the State of New York on the respective rights and obligations of the City of New York and the Fire Department, and concluded that, even under the decisions of the State of New York, the City was liable for the acts of the employees of the Fire Department. He also relied on the decision of this Court in the case of Barnes *v.* District of Columbia, 91 U. S., 540.

SIXTH.—Appeal having been taken from the decree of the District Court, the United States Circuit Court of Appeals for the Second Circuit rendered a decision on April 16th, 1895, affirming the decree of the District Court as to the pilot Gallagher, and reversing it as to the Mayor, etc., and dismissing the libel as to the Mayor, etc., with costs. The opinion of said Circuit Court of Appeals was rendered by Judge Wallace, who sustained the finding of the District Court as to the negligence of the fireboat, but held that for this negligence the municipality was not liable. In his opinion he said that "in selecting and employing" the officers and agents of the Fire Department "the municipality merely performs a political or governmental function; the duties intrusted to them do not relate to the exercise of corporate powers; and hence they are the agents or servants of the public at large." Accordingly he held that the municipality was not liable for the negligence of the fireboat.

He said further that "accountability, either personally or on the principle of agency, must concur with injury to give a cause of action in any tribunal, equally in admiralty as at common law."

SEVENTH.—Thereafter the libellant duly filed his petition to said United States Circuit Court of Appeals, praying for the certification to this Court of the questions involved herein as follows:

1. Whether the City of New York is liable for the negligent navigation of a fireboat in respect to a collision with a British vessel which at the time is moored alongside a wharf within the municipality?

2. Whether the liability of a municipal corporation for a wrongful collision on navigable waters by a city fireboat is to be determined by the municipal law and statutes of the State of New York or by the principles of the maritime law?

3. Whether the admiralty recognizes any exemption in favor of a municipality owning and operating a

vessel upon navigable waters for the purpose of extinguishing fires? 17

4. Whether the liability of a municipal vessel owner for negligent collision depends in the admiralty upon the doctrine of *respondeat superior*, or is incidental to ownership, even if the pilot in charge be not the servant of the owner.

5. Whether the rules of the State common law courts, in respect to a trespass by a fire engine on land, are to be followed by the Federal courts, sitting in admiralty, in determining the liability of a city for maritime torts by a steam fireboat? 18

6. Whether a State has the power to authorize a municipality to use a steam vessel in navigable waters, and exempt the municipal owner from the liabilities imposed on other vessel owners.

On May 6th, 1895, said Circuit Court of Appeals denied the application for certification aforesaid, and 19
made an order reversing the decree of the District Court as against the Mayor, etc., and directing the issuance of a mandate accordingly.

EIGHTH.—Your petitioner avers that this case is one in which it is proper for this Court to issue a writ of *certiorari* for the following reasons:

1. The questions involved are of great importance, and have never been passed upon by this Court.

2. There is no controversy as to the facts, both the 20
District Court and the Circuit Court of Appeals having found that the collision was due to the negligence of the fireboat. The questions therefore are purely questions of law.

3. The Circuit Court of Appeals based its decision upon the municipal law as interpreted by the common law courts of the several States. In its opinion it cited no decision in the admiralty, and but one federal

21 case (Weightman *v.* Washington, 1 Blatch., 39), which was an action upon the case at common law.

In the case of the *China*, 7 Wallace, 68, the Supreme Court said:

"The maritime law as to the position and powers of the master and the responsibility of the vessel *is not derived from the civil law of master and servant, nor from the common law.*" * * * "The remedy of the damaged vessel, if confined to the culpable pilot, would frequently be a mere delusion. He would often
22 be unable to respond by payment, especially if the amount recovered were large. Thus, where the injury were greatest, there would be the greatest danger of a failure of justice."

4. One of the principal questions involved is a constitutional question, namely, the power of a State to authorize a municipality to use a steam vessel in navigable waters, and exempt the municipal owner from the liabilities imposed on other vessel owners.

23 5. The *Linda Park* is a British vessel, and the petitioner is a British subject. By the application by the Circuit Court of Appeals of a distinction made by the New York Courts between the various departments of the City of New York, a foreign vessel coming to the principal port of this country, although free from fault, cannot recover against the city for collision with a municipal boat, if it happens to belong to one department rather than another.

In the case of Jones *v.* the Mersey Docks (L. R. 1
24 H. of L., 122, 123), Lord Chancellor Cranworth said:

"It would be a strange distinction to persons coming with their ships to different ports of this country, that in some ports if they sustain damages by the negligence of those who have the management of the docks, they will be entitled to compensation, and in others they will not; such a distinction arising not from any visible difference in the docks themselves, but from some municipal difference in the constitution of the bodies by whom the docks are managed."

6. Similar actions are pending in other districts, for

which reason questions of such importance and far- 25
reaching results should be decided by this Court.

Wherefore your petitioner prays that this Honorable Court will be pleased to grant a writ of *certiorari* in this cause to the United States Circuit Court of Appeals for the Second Circuit, to bring this cause before this Honorable Court, and for such other relief as to this Honorable Court may seem just.

ROBERT W. WORKMAN,
Petitioner. 26

By WING, SHOUDY & PUTNAM,
his proctors.

SOUTHERN DISTRICT OF NEW YORK, }
City and County of New York, } ss.:

HARRINGTON PUTNAM being duly sworn, says that he is a member of the firm of Wing, Shoudy and Putnam, proctors for the libellant, Robert W. Workman, and is authorized to make this verification on his own 27
behalf, the libellant being absent from the United States and residing in Belfast, Ireland; that he has read the foregoing petition and knows the contents thereof, and that the same is true to the best of his knowledge. The sources of deponent's knowledge and the grounds of his belief are found in the proceedings and in the record of the cause in the District Court and in the United States Circuit Court of Appeals.

HARRINGTON PUTNAM.

Sworn to before me this } 28
14th day of May, 1895. }

[SEAL] JAMES FORRESTER,
Notary Public Kings County.
Certificate filed in N. Y. County.

I hereby certify that I have examined the foregoing petition, and that, in my opinion, the petition is well founded, and that the same is one in which the prayer of the petitioner should be granted.

JAMES K. HILL.

No. 1092. 6/8

Brief of Putnam for Appellee

FILED 38
MAY 20 1895
JAMES H. McKENNEY
Clerk

Filed May 20, 1895.

SUPREME COURT OF THE UNITED STATES

In the matter of the petition

of

ROBERT W. WORKMAN for a writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit

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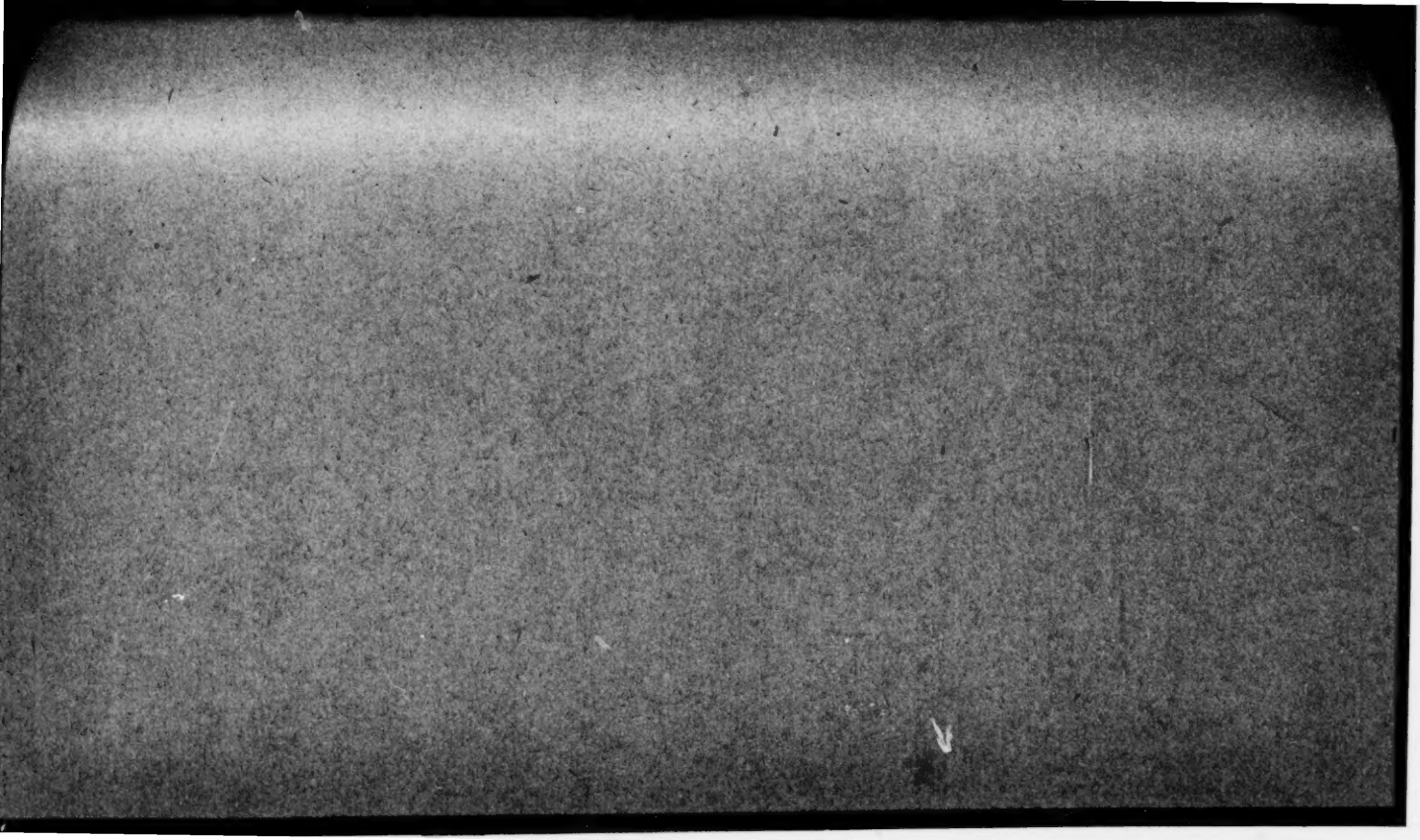
BRIEF FOR PETITIONER

HARRINGTON PUTNAM
Advocate



Supreme Court of the United States,

In the Matter of the petition of Robert W. Workman for a writ of *certiorari* to the United States Circuit Court of Appeals for the Second Circuit.

Brief in support of the petition of libellant for a writ of certiorari.

This suit was brought in the District Court of the United States for the Southern District of New York by the libellant, as owner of the barkentine *Linda Park*, against the Mayor, Aldermen and Commonalty of the City of New York, to recover the damages suffered by said barkentine by collision with the fire-boat *New Yorker*, of which the municipality of New York was the owner.

The collision occurred on June 11th, 1893. The barkentine was lying alongside Pier 48, East river, in the City of New York, loaded and ready for sea. A fire having broken out on South street near the pier, the fire-boats *New Yorker* and *Havemeyer* were summoned by telegraph. The *Havemeyer* entered the slip in which the barkentine was lying, and began to play on the fire (Record, fols. 213–220). The *New Yorker* arriving later, entered the slip at high speed, and ran into the bow of the barkentine, causing the damage for which the libel was filed.

The negligence of the fireboat was abundantly established. The District Judge found "that the running into the *Linda Park* arose through lack of reasonable prudence, and was unnecessary and negligent" (Opinion of District Judge, fols. 521–2).

The Circuit Court of Appeals, in its decision, said: "The evidence in the record adequately supports the conclusion of the Court below, that the injuries caused to the libellant's vessel by the impact of the fireboat were caused by the negligent manner of the fireboat while the latter was trying to reach a convenient location to play upon a burning building near the pier at which the libellant's vessel was moored" (Record, p. 128).

The original libel, which was against the Mayor, Aldermen, and Commonalty of the City of New York, as sole respondent (Record, p. 3), was subsequently amended so as to make the Fire Department of the City of New York, and James Gallagher, the pilot of the fireboat, parties respondent. The District Court dismissed the libel as against the Fire Department, and held the municipality and the pilot liable for the damages (Opinion of District Judge, p. 105), and on August 28th, 1894, made a decree in favor of the libellant against the Mayor, Aldermen, and Commonalty and said Gallagher for $815.84, which included interest and costs (Record, p. 115).

From this decree both the Mayor, &c., and Gallagher appealed, and on April 16, 1895, the Circuit Court of Appeals rendered its decision affirming the decision of the District Court as to Gallagher, with costs, and dismissing the libel as against the Mayor, &c., with costs of the District Court and said Circuit Court of Appeals (Opinion, p. 127).

The libellant applied to the Circuit Court of Appeals for a certification of the questions involved in the case to this Court. This application was denied on May 6th, 1895 (Decision, p. 137).

The principal question in the District Court and on appeal in the Circuit Court of Appeals was whether the Mayor, Aldermen and Commonalty of the City of New York were liable for the negligence of the fireboat. The District Court sustained the liability. The Circuit Court of Appeals held that they were not responsible.

It is respectfully submitted that the Circuit Court of Appeals erred in its decision of this question, and that a writ of *certiorari* should issue directing the return of all proceedings to this Court for review.

POINTS.

I.—The Circuit Court of Appeals erred in applying the principles of the law of master and servant to the case at bar.

In its opinion it said :

"That the suit is brought in a Court of Admiralty instead of a common-law court, and that the negligence consisted in the improper navigation of the vessel, are considerations which cannot affect the conclusion. * * * Accountability, either personally or on the principle of agency, must concur with injury to give a cause of action in any trjbunal, equally in admiralty as at common law. If the City of New York would not have been liable if one of its steam fire engines, manned by the members of the fire department, had, by want of due care, while endeavoring to reach a conflagration, injured an individual or his property, it cannot be liable in the present suit."

In the case of the *China*, 7 Wallace, 68, this Court said :

"The maritime law as to the position and powers of the master and the responsibility of the vessel *is not derived from the civil law of master and servant, nor from the common law.* It had its source in the commercial usages and jurisprudence of the middle ages. Originally the primary liability was upon the vessel and that of the owner was not personal, but merely incidental to his ownership, from which he was discharged either by the loss of the vessel or by abandoning it to the creditors. * * * The remedy of the damaged vessel, if confined to the culpable pilot, would frequently be a mere delusion. He would often be unable to respond by payment, especially if the amount recovered were large. Thus, where the injury were greatest, there would be greatest danger of a failure of justice."

II.—As owner of the fireboat the Mayor, Aldermen and Commonalty of the City of New York must respond *in personam* for this tortious collision.

In the *Druid* (1 W. Rob., 391), cited by Mr. Justice Swayne in the *China*, Dr. Lushington said that the liability of the ship and the responsibility of the owners were convertible terms. The ship is not liable if the owners are not; and no responsibility can attach to the owners, if tthe ship is not liable to be proceeded against.

From considerations of public policy boats belonging to a municipality are not subject to arrest in a suit *in rem.*

The *Fidelity*, 9 Blatch., 572, where Chief Justice Waite said:

"As has already been seen, the public property of a municipal corporation cannot be seized on an execution, although the corporation may be sued to obtain a judgment on which an execution can issue. The simple right to sue, therefore, does not carry with it the right to seize all property. It follows necessarily that the exemption from seizure is not always the same as exemption from suit" (16 Blatchf., 572).

But in order that justice be done, the corporate owner should be answerable *in personam.* Unlike the State, the City is suable in the admiralty, and is ordinarily liable for the marine torts of all its maritime instrumentalities.

"The various decisions of the federal courts hereinbefore cited, and the reasons leading to the conclusions therein, seem to show that where a question of maritime right is presented to an Admiralty Court, that Court, at least in the absence of legislation establishing a contrary rule, may enforce said right and provide remedies for its violation in accordance with the rules of admiralty." Per Townsend, J., *Greenwood* v. *Town of Westport*, 60 Fed. Rep., 577.

In the case of *Giovanni* v. *The City of Philadelphia*, 59 Fed. Rep., 303, a municipal tug was held liable

for collision. Judge Butler in delivering his opinion said:

"The respondent further defends on the ground that the city is not responsible for the fault of the tug; that the towing of vessels is not a part of the functions imposed on the corporation, but is a public duty exercised for the benefit of the whole public, and cites §980 of 2 Dill. Mun. Corp., in support of this position. The doctrine invoked is old and well understood. It has no application, however, to the facts of this case. *We need not concern ourselves with the question whether courts of admiralty recognize it;* it is sufficient that the tug was not engaged in the discharge of a public duty such as the doctrine contemplates. but in the prosecution of a private enterprise for the respondent's profit under its direction, and in pursuance of its chartered rights. Under such circumstances it is well settled that the municipality is entitled to no immunity" (p. 304).

A municipal ice boat used to break ice in Baltimore Harbor, through the result of a miscalculation by the master, caused a collision with another vessel.

Judge Morris said in his opinion:

"It is urged that the doctrine of *respondeat superior* does not apply because it is said that this is the case of a municipal corporation in the exercise of its governmental powers performing through its officers a public service from which it derives no special benefit in its corporate capacity." * * * *

"And when in the performance of any duty, either imposed upon or assumed by it, the municipality employs maritime instrumentalities, I think it should be held answerable under the maritime law, with those exceptions only which public policy absolutely requires. If the vessel belonging to the municipality is used by it as a necessary instrument in the exercise of some municipal function, then, as was held by the Chief Justice in the case of the *Fidelity*, public policy requires that the municipality shall not be deprived of its use and therefore the maritime lien cannot attach; but to my mind no sufficient necessity or reason has been suggested for denying a remedy against the municipality as the owner of the offending vessel. * * * * * It is no argument in favor of denying the injured party his remedy *in personam* against the

owner to say that because of public convenience or necessity, he must not be allowed his lien upon the offending ship, but quite the contrary, and especially in a case in which, but for these considerations of public policy, which prevent the seizure of the ship, he would have the protection both of a privilege against the ship and the responsibility of the owner" (p. 380). The *F. C. Latrobe*, 28 Fed. Rep., 377 (1886)

It was also held by the same court in the case of Oyster Police Steamers of Maryland (31 Fed. Repr., 763), that the vessels employed by the State in governmental duties were liable for penalties for failure to have inspection of their boilers as required by the Federal law.

Considering the exemptions for cities and other political divisions of the State, which, it was claimed, relieve public vessels from the Federal law, Judge Morris said:

"The result of that rule, so applied, would, therefore, be that no penalty would be enforced for refusal to submit to inspection any of the numerous steam police boats, fire extinguishing steamers, relief boats, ice boats, and other steam vessels used by the large seaboard cities, and they would ply among the vessels in crowded ports and lie at the docks among other shipping free from supervision of any kind prescribed by congressional enactments. The question of public policy would, therefore, not be so narrow a one as might seem upon first impression" (p. 768).

III.– The decision of the State Courts as to the liability of a municipality for the negligence of officers or employees of its departments cannot bind the admiralty.

Notwithstanding the grant of admiralty jurisdiction conferred through the Constitution upon the Federal Courts to hear and determine actions for collision, it is now maintained that the Federal Courts cannot render a decree against a municipality—no matter how gross and culpable has been the mismanagement with which

the city boat has destroyed the property of innocent persons.

As is remarked by the learned District Judge:

"It is certainly a startling proposition that all the shipping of this port, foreign and domestic, should be at the mercy of the City fireboats, and liable to be negligently run down and sunk at any moment without responsibility for damages" (fol. 423).

The exception to the general rule of corporate liability by which the city has escaped answering for the faults of the *New Yorker* under the decision of the Circuit Court of Appeals is:

"That the officers selected by a municipal corporation to perform a public service for the general welfare of the inhabitants or the community in which the corporation has not private interest and from which it derives no special benefit or advantage in its corporate capacity are not to be regarded as the servants or agents of the municipality, and for their negligence or want of skill it cannot be held liable. This is so, notwithstanding such officers derive their appointment from and are paid by the corporation itself. In selecting and employing them the municipality merely performs a political or governmental function; the duties intrusted to them do not relate to the exercise of corporate power, and hence they are the agents or servants of the public at large."

Opinion, fols. 513-5.

It is no part of the public or political duties of the State to extinguish fires. Probably the first body of firemen ever organized was by mutual contribution of the Hand in Hand office, created in London in 1696. This association kept in their service for extinguishing fires thirty-five men who were clothed and wore a badge.

The London fire brigade (established in London 1833 and in 1855) was organized and maintained by the different fire insurance companies, and, although at first it had only hand engines, before 1859 it had two floating engines on the Thames.

See Harmony Fire Co. *v.* Trustees, 35 Penn. St., 500.

On the first of January, 1866, the control of the fire brigade and of other fire establishments was devolved on the Metropolitan Board of Works, 28 and 29 Vict., Ch. 70.

In our cities and towns, the earliest organizations were voluntary. On account of disorders and riotous proceedings at fires, regulations began to be made after 1840. Municipal fire departments in most Northern cities were established by legislation, which were followed by the disappearance of the old volunteer companies, and the formation of trained, uniformed, salaried bodies with the present improved steam appliances.

The fire organization of Paris was by decree of December 5, 1866. The Court of Cassation has repeatedly held the Commune answerable for damage to private property done by firemen in execution of measures to put out a fire. The Commune is held liable to make good all damage which results from the carrying out of the orders of the duly constituted authority of the Commune. In 1883 the case arose of firemen breaking into an enclosure to get water for their pumps. Their action was not ordered by the officials. The Court of Cassation, however, held that the Commune was bound to indemnify the owner for all his damage, even though the particular firemen who did the injury had come from a neighboring Commune.

Commune de Charenton *v.* Gillett, 3d January, 1883, Dalloz I., 211.

IV.—The distinction taken by the State Courts between one city department and another, is not reasonable.

To say that the cleaning of the streets is corporate and that the city is liable for the injury done by its dumping scows or other street cleaning appliances, but that it is exempt from liability for mismanage-

ment of its steam fireboats is a perversion of legal principle which this Court will never sanction.

In the case of Jones *v.* the Mersey Docks, Lord Chancellor Cranworth said:

"It would be a strange distinction to persons coming with their ships to different ports of this country, that in some ports if they sustain damages by the negligence of those who have the management of the docks, they will be entitled to compensation, and in others they will not; such a distinction arising not from any visible difference in the docks themselves, but from some municipal difference in the constitution of the bodies by whom the docks are managed" (L. R., 1 H. of L., 122, 123).

The *Linda Park* and other foreign vessels entering our wharves and engaged in commerce in this port are asked by the corporation counsel to accept a still stranger distinction. The boats of the Street Cleaning Department and of the Dock Department (if there are such) are admittedly liable for their faults, but other boats, also a part of the local administration of the city, are free to run into innocent vessels with no remedy to those injured.

The distinction cannot be upheld, that municipal liability depends upon the receipt of gain by the city, thus creating a fund out of which innocent sufferers may receive compensation. While such departments may properly be compelled through the city to make recompense for wrongs suffered, the liability cannot be dependent on the earnings or emoluments of the wrong-doing branch of the municipality. No one contends that the Department of Street Cleaning is a source of revenue. The city, however, is admittedly answerable for any fault of the employees of that department on land or water. It is said as a reason that the duty of street cleaning is laid upon the city, which gives an individual a right to sue for the breach of that duty. But this distinction of corporate liability has no logical application to a maritime collision.

The liability for failure to clean streets properly or to remove garbage before a residence, may very well

depend on express legislation imposing such a duty on the municipality. But the liability for collision (being a trespass) even at common law, stands on no such distinction. This duty to refrain from running into and destroying the property of another, has its sanction in the fundamental principle that every property owner is bound "to control the use of his property, and to use it in such a manner as not to produce injury to others."

Bailey *v.* Mayor, 2 Denio, 433.

Where the individual is injured by acts of omission the inquiry may well be whether the neglected duty was imposed by statute upon the corporation; but where the act is a violent tort committed or arising from municipal propriety, the breach of duty appears *ipso facto* in the tort itself—even by the rules of the common law.

Upon this ground, it was held by the General Term of the New York Superior Court that the Metropolitan Fire Department was liable to an action for the negligent explosion of the boiler of a steam fire engine.

Clarissy *v.* Metropolitan Fire Department, 7 Abbott Pr., N. S., 352 (1869).

The duty of the municipal owner of a steamboat to navigate it so as not to collide with a private vessel alongside a wharf, is an instance which Judge Dillon calls a "duty of perfect obligation." This duty is specific, clearly defined and imperative. Even if the boat were employed in the governmental duties of the city, as contradistinguished from its corporate functions, it is not seen how the attribute of irresponsibility could cover such an invasion of private rights as a collision with a helpless vessel alongside a city wharf.

Referring to the New York cases of the Croton Dam, this Court said :

"The struggle in the New York Courts was between the dictates of that evident justice and good sense which required that the city should indemnify a suf-

ferer from the loss arising from the acts of those doing a work under its authority and for its benefit, and the technical rule which exempted it from liability for acts of officers not under its control or appointed by it." Barnes *v.* District of Columbia, 91 U. S., 554.

In this opinion, the very case of a collision was referred to by the Court as an illustration of liability for property where the relation of master and servant did not strictly exist (p. 546).

See Salt Lake City *v.* Hollister, 118 U. S., 256, 262.

In a recent case, where the authorities were elaborately considered, the distinction between the state and federal jurisprudence on this subject was clearly stated:

"And it has been held in Connecticut that a municipal corporation is not liable for the negligent performance of a strictly governmental duty. *Hewison* v. *New Haven*, 37 Conn., 475; *Jewett* v. *New Haven*, 38 Conn., 368. That such exemption from liability is not in harmony with the general rule of liability in this country, nor with the decisions of the federal courts, is settled by the repeated adjudications of the Supreme Court of the United States. *Barnes* v. *District of Columbia*, 91 U. S., 540, citing *Jones* v. *New Haven*, 34 Conn., 1; *Evanston* v. *Gunn*, 99 U. S., 660; *Chicago* v. *Robbins*, 2 Black, 428; *Nebraska City* v. *Campbell*, *Id.* 590; *Weigntman* v. *Corporation of Washington*, 1 Black, 50; *City of Detroit* v. *Osborne*, 135 U. S., at page 498, 10 Sup. Ct., 1012. See also *Patton* v. *Montgomery*, 96 Ind., 131; *City of Goshen* v. *Meyers*, 119 Ind., 196, 21 N. E., 657.

Townsend, J., in *Greenwood* v. *Town of Westport*, 60 F. R., 570, 569.

The contention for exemption for damages by collision is similar to the municipal defenses heretofore interposed and overruled by the federal courts where property rights had been invaded.

In 1879 the City of New York resisted liability in the Circuit Court of the United States for this Circuit for the infringement of a patent by the Board of Education. It was stated in the opinion:

"It is argued that upon this proof the city is not

liable in this suit for two reasons—one is because these instrumentalities having charge of the schools are corporations themselves, over which the city has no control; the other is that the use is under sovereign authority delegated by the State of New York in its sovereign capacity for which the city or the Board of Education or the Department of Public Instruction can no more be held liable to suit than the State itself."

After discussing the separate incorporation of the Board of Education, the Court said:

"That the acts constituting the infringement were committed in the exercise of the authority derived from the State cannot shield the defendants from liability."

Allen *v.* The Mayor, 17 Blatchf., 350, 352.
Followed in Munson *v.* The Mayor, 3 F. R., 338.
See Gamewell Fire Alarm Co. *v.* The Mayor, 31 Fed. Rep., 312.
Also Bliss *v.* City of Brooklyn, 4 Fisher Patent Cases, 596.

No stronger instance can be cited of the political or governing agency of the State than the construction and maintainance of prisons, jails and penitentiaries. It has been held by the Federal Courts that even such an imperfect and *quasi* corporation as a county is liable to suit for infringement—although the patent was for improvement of prisons.

May *v.* Mercer Co., 30 Fed. Rep., 246.
Also 16 American Law Review, 371.

The effect of these clear expositions of the law of municipal liability is becoming apparent upon the Courts of New York. In Hill *v.* The Mayor, 139 N. Y., 495, 501, the Court unanimously said:

"But to this the city answers that what it has done has been under the authority of law; that as a municipal corporation, engaged in the performance of a public duty, upon which the public health and comfort depends, and acting by express authority of the Legis-

lature, is not liable for consequential injuries resulting to others, even though its acts would amount to a nuisance as between individuals. It cites abundant authority for the general doctrine, running from *Radcliff* v. *Mayor* (4 N. Y., 195), and *Bellinger* v. *N. Y. Cent. P. R.* (23 *Id.*,42), down to *Atwater* v. *Trustees of Canandaigua* (124 *Id.*, 602). * * "For, consider what the proposition is. It upholds a possible damage to the citizen and denies him any remedy; it infringes his normal and recognized rights with absolute impunity; it sets a nuisance at his door utterly unbearable and requires him to bear it. Surely, an authority which so results should be remarkably strong and clear. In *U. S.* v. *Fisher* (2 Cranch, 390), Chief Justice Marshall said: "Where rights are infringed, where fundamental principles are overthrown, where the general system of the laws is departed from, the legislative intention must be expressed with irresistible clearness to suppose a design to effect such objects." In *Coggswell* v. *N. Y., N. H. & Hart. R. R. Co.* (103 N. Y., 10), Judge Andrews said: "But the statutory sanction which will justify an injury to private property must be express, or must be given by clear and unquestionable implication from the powers expressly conferred, so that it can fairly be said that the legislature contemplated the doing of the very act which occasioned the injury." And in *Bohan* v. *Port Jervis Gas Light Co.* (122 N. Y., 18), the same rule was asserted. * * * "Obviously, the general doctrine which levies upon individuals forced contributions for the benefit of the public, and denies compensation for the injury done, is vulnerable at two points. It is defeated sometimes by construing the harm inflicted into a taking of private property for which compensation must be made, and sometimes by a rigid construction of the authority claimed. *Both methods indicate a lurking doubt of the equity of the general doctrine, and a disposition to narrow the field of its operation.*"

By the English common law there was no remedy for damage incidentally done in extinguishing fire. The loss remained where it fell (Bowditch *v.* Boston, 101 U. S., 16). . In the admiralty, if one interest is sacrificed to avert a fire loss to others in the same common interest, a right of contribution in general average is recognized (Heye *v.* the North German Lloyd, 36 F. R., 705). So also in case of extraordinary efforts

to put out fire, the admiralty allows salvage reward, while at common law there is no compensation, however meritorious the service. It is also intimated by the common law courts, that a private individual is not liable for damage caused by his want of care in efforts to put out a fire. In the Admiralty, however, there is a liability for omitting ordinary precautions. Thus a tug, attempting to tow a burning vessel out into the stream, was held liable for using a hempen hawser instead of a chain.

The *Clarita*, 23 Wallace, 1.

V.—A grave question of constitutional law is also presented—whether it is competent for the State of New York by its legislation to authorize a city to maintain and navigate a steam vessel, free from any of the liabilities of vessel owners.

The whole question of extending the immunity of cities to navigation of vessels is now unsettled. By courtesy the lien *in rem* is not enforced by the Courts of Admiralty, since the issue of process is deemed an improper interference with the orderly municipal administration.

Under this decision of the Circuit Court of Appeals, the vessel or property injured by the faulty navigation of a city fire-boat has no redress.

The Department of Education of New York is also held by the State Courts to be political and governmental, as distinguished from corporate, and, therefore, that the city is not liable for the tortious acts of its employees in that department.

Among the educational instrumentalities of New York City is the Schoolship *St. Marys*—a training ship which engages in the long summer cruises in the Atlantic. Suppose this city ship should negligently collide with an innocent vessel. Could it be claimed in this Court, that the liability both *in rem* and *in personam* was taken away by the legislation and de-

cisions of the State of New York, that the Federal Admiralty Courts were powerless to afford any relief?

The fact that the collision in the case at bar occurred within the territorial limits of the City of New York does not affect the question. The *Linda Park* at the time was engaged in foreign commerce. She was run into while on navigable waters within the admiralty jurisdiction. A city or town has no logical attribute of irresponsibility. It is liable for the usual consequence of ownership, and this liability may be enforced by the courts.

How can the position be sustained that the corporate owner of a steam vessel, if navigated contrary to law, is exempt from liability? Surely if the State of New York can exempt a municipal shipowner, it could also exempt any private corporation, and could thus authorize a species of irresponsible vessel ownership, which in other countries is jealously limited to the public armed vessels of foreign sovereignties.

VI.—The doctrine of municipal irresponsibility has grown up under the common law, and local statutes.

Even in common law actions, this Court has declared and uniformly held to a stricter rule of liability than the courts of the State of New York. It has also held firmly to the principle that every ship-owner should so use his property as not injure another. The admiralty law of this Court is "Fault creates liability." If the only redress is a suit *in personam*, then the owner must respond to the value of his *res*.

Suppose the offending vessels were actually seized under judicial process, the *China* case is a direct authority deciding that the liability of the owner does not depend on agency, or the relation of master and servant, but is a responsibility incidental to ownership.

Obviously this liability does no turn on the form of process. The proceeding *in rem* does not create the liability, but is only a convenient mode of obtaining security.

It would lead to strange and unjust results to hold that it was necessary to have a seizure *in rem*, in order to apply the doctrine of the maritime law. Suppose for example that the delinquent vessel escapes from the jurisdiction without actual arrest, could it then be maintained that the maritime liability of the owner was thereby displaced, and that a recovery could only be had against the owner under the common law rules of agency, which would result in his escaping liability unless he actually appointed the pilot ?

VII.—A serious international question is involved. The owner of the *Linda Park*, a British subject engaged in lawful commerce with this country, is fairly entitled to the decision of this Court. To require him to submit to the decision of the Circuit Court of Appeals is in effect a denial of justice, which exposes our jurisprudence to a reproach, when it is born in mind that in Great Britain foreign ship-owners, including those of our own country, are permitted to carry their controversies to the highest court.

To grant the application would give the petitioner that relief to which the admitted hardship of his case should entitle him, and enable this Court to settle definitely the serious questions arising from municipal ownership of vessels, and to decide whether or not such ownership is virtually irresponsible, as is now held by the Circuit Court of Appeals.

VIII.—The writ of *certiorari* to the United States Circuit Court of Appeals for the Second Circuit should be granted.

HARRINGTON PUTNAM
Advocate for Petitioner

May 18, 1895

No. 276. 42 A S 1

Brief of Putnam & Burling
for Appellee

Filed Apr. 10, 1897.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1895

Office Supreme Court,
FILED
APR 10 1897
JAMES H. McKENNEY
Clerk

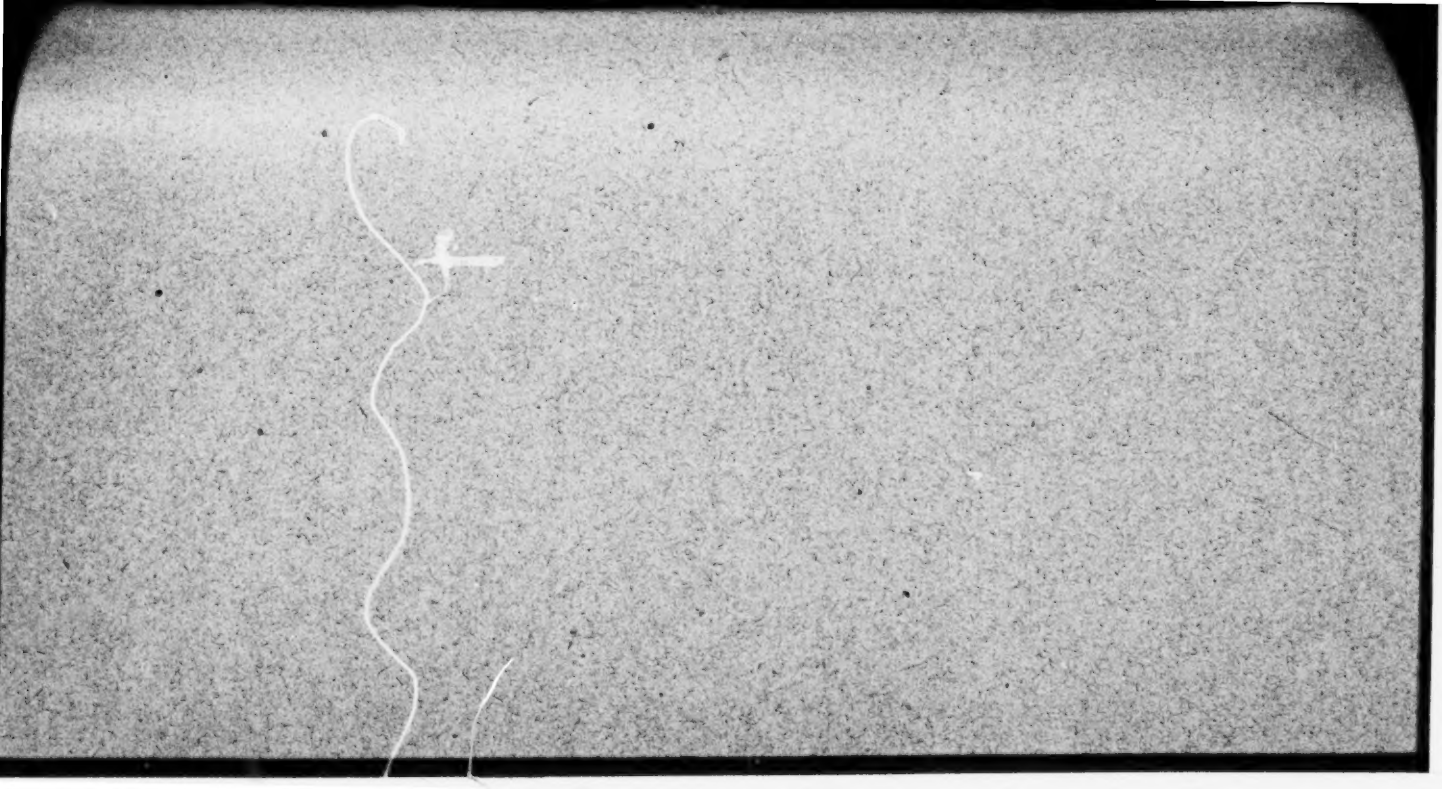
THE MAYOR, ALDERMEN AND COMMONALTY OF THE CITY OF NEW YORK and JAMES A. GALLAGHER,
Appellants,
vs.
ROBERT W. WORKMAN,
Libellant-Appellee.

No. 276

ON A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE LIBELLANT

COWEN, WING, PUTNAM & BURLINGHAM
Proctors for Libellant



SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1896.

THE MAYOR, ALDERMEN, AND COMMONALTY OF THE CITY OF NEW YORK and JAMES A. GALLAGHER,
Appellants,
vs.
ROBERT W. WORKMAN,
Libellant-Appellee.
No. 276.

ON A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

Brief for Workman, libellant.

This suit was brought in the District Court of the United States for the Southern District of New York by the libellant, Robert W. Workman, as owner of the barkentine *Linda Park*, against the Mayor, Aldermen and Commonalty of the City of New York, to recover the damages suffered by said barkentine by collision with the fireboat *New Yorker*, of which the municipality of New York was the owner.

The collision occurred on June 11th, 1893. The barkentine was lying alongside Pier 48, East river, in the City of New York, loaded and ready for sea. A fire having broken out on South street near the pier, the fire-boats *New Yorker* and *Havemeyer* were summoned by telegraph. The *Havemeyer* entered the slip in which the barkentine was lying, and began to play on the fire. The *New Yorker*, arriving later, entered the slip at high speed, and ran into the bow of the barkentine, causing the damage for which the libel was filed.

The negligence of the fireboat was abundantly established. The District Judge found "that the running

into the *Linda Park* arose through lack of reasonable prudence, and was unnecessary and negligent" (Opinion of District Judge, page 76).

The Circuit Court of Appeals, in its decision, said: "The evidence in the record adequately supports the conclusion of the Court below that the injuries caused to the libellant's vessel by the impact of the fireboat were caused by the negligent manner of the fireboat while the latter was trying to reach a convenient location to play upon a burning building near the pier at which the libellant's vessel was moored" (Record, p. 89).

The original libel, which was against the Mayor, Aldermen, and Commonalty of the City of New York as sole respondent (Record, p. 1), was subsequently amended so as to make the Fire Department of the City of New York and James Gallagher, the pilot of the fireboat, parties respondent (p. 9). The District Court dismissed the libel as against the Fire Department, and held the municipality and the pilot liable for the damages (Opinion of District Judge, p. 82), and on August 28th, 1894, made a decree in favor of the libellant against the Mayor, Aldermen, and Commonalty and said Gallagher for $815.84, which included interest and costs (Record, p. 83).

From this decree both the Mayor, &c., and Gallagher appealed, and on April 16, 1895, the Circuit Court of Appeals rendered its decision affirming the decision of the District Court as to Gallagher, with costs, and dismissing the libel as against the Mayor, &c., with costs of the District Court and the Circuit Court of Appeals (Opinion, p. 89).

The libellant applied to the Circuit Court of Appeals for a certification of the questions involved in the case to this Court. This application was denied on May 6th, 1895 (Decision, p. 94).

Application was thereupon made by the libellant to this Court for a writ of certiorari, which was granted on May 28th, 1895 (Record, p. 95).

"The case presents the legal question whether the municipal corporation, the Mayor, etc., of the City of

New York, is responsible for the negligence of the members of its fire department committed while attempting to extinguish a fire within the corporate limits."

Opinion of Circuit Court of Appeals, p. 89.

A recently compiled list of the steam fire-boats owned and employed by the cities of the United States is also annexed (A p. 23), showing a fleet of twenty four vessels. These obviously do not include the larger number of municipal boats for police, docks, street cleaning, ice breaking, dredging, and for the departments of charities and correction. By reason of the large commercial interests along the water fronts the tendency is to equip city fire boats with great propelling power, so that they may be driven at a high speed to the place where their services are required.

In view of the possible damage to other vessels from such a fleet, plying in crowded harbors, the learned District Judge, Honorable Addison Brown, said:

"It is certainly a startling proposition that all the shipping of this port, foreign and domestic, should be at the mercy of the city fire boats and liable to be negligently run down and sunk at any moment without responsibility for damages." (*Record*, p. 76,)

The provisions of the charter of the City of New York creating that corporation, including those relating to the Fire Department, are printed in the appendix. (B p. 24.)

POINTS

I.—The responsibility of the municipality should be determined, not by the municipal law of master and servant, but by the principles of the maritime law.

Both the District Court and the Circuit Court of Appeals sought to apply to a case of collision on navigable waters the municipal law of the State of New

York. Although they came to different conclusions, the District Court holding the city liable and the Circuit Court of Appeals holding it not liable, both Courts approached the question by the same road. The question with each was the same—Is the extinction of fires a governmental or a corporate function? Judge Brown, after a very careful examination of the New York decisions, concluded that in putting out fires the City of New York was exercising a corporate function. The Circuit Court of Appeals held that "the duties of municipal corporations in respect to protecting its citizens from the dangers of fire are governmental, and not corporate," and accordingly held the city not liable.

In his opinion Judge Wallace said:

"That the suit is brought in a court of admiralty instead of a common-law court, and that the negligence consisted in the improper navigation of the vessel, are considerations which cannot affect the conclusion. * * * Accountability, either personally or on the principle of agency, must concur with injury to give a cause of action in any tribunal, equally in admiralty as at common law. If the City of New York would not have been liable if one of its steam fire engines, manned by the members of the fire department, had, by want of due care, while endeavoring to reach a conflagration, injured an individual or his property, it cannot be liable in the present suit."

Record, p. 89.

In the case of the *China*, 7 Wallace, 68, this Court said:

"The maritime law as to the position and powers of the master and the responsibility of the vessel *is not derived from the civil law of master and servant, nor from the common law.* It had its source in the commercial usages and jurisprudence of the middle ages. Originally the primary liability was upon the vessel and that of the owner was not personal, but merely incidental to his ownership, from which he was discharged either by the loss of the vessel or by abandoning it to the creditors. * * * The remedy of the damaged vessel, if confined to the culpable pilot, would frequently be a mere delusion. He would often be unable to respond by payment, especially if the

amount recovered were large. Thus, where the injury were greatest, there would be greatest danger of a failure of justice."

Marsden in his work on Collisions attacks this doctrine (3rd ed., pp. 75–6) and claims that "at the present day it would not be followed." But he says (p. 77) that

"The doctrine which, treating the ship as the wrongdoer, makes her liable in Admiralty under all circumstances, and without regard to her ownership, has been carried further in the American Courts than is consistent with the English decisions. See per Story, J., United States *v. The Malek Adhel*, 2 How., 210,233."

Marsden on Collisions, p. 77, Note a.

Again he says:

"In America, the liability of the ship, as distinguished from the personal liability of the owner, has been carried further than it has ever been carried by the Courts of this country. In a case before the Supreme Court (*The Malek Adhel, supra*) Story, J., quoted with approval the following passages from a judgment of Marshall, C. J.: 'This is not a proceeding against the owner; it is a proceeding against the vessel for an offense committed by the vessel.' And again, quoting from another case, he says: 'The thing is here primarily considered as the offender, or rather the offense is primarily attached to the thing.' This, it will be observed, is not the view taken by the Courts of this country."

Marsden, pp. 93–4.

However, the most recent British maritime authority declares the full liability of the offending vessel for damage by collision. In Currie *v.* McKnight, 1897, A. C., 97,106, Lord Watson, delivering the judgment of the House of Lords, said:

"The great increase which has taken place in the number of sea-going ships propelled by steam power at high rate of speed has multiplied to such an extent the risk and occurrence of collisions, that it has become

highly expedient, if not necessary, to interpret the rules of maritime liability in the manner best fitted to secure careful and prudent navigation. And in my opinion it is a reasonable and salutary rule, that when a ship is so carelessly navigated as to occasion injury to other vessels which are free from blame, the owners of the injured craft should have a remedy *against the corpus of the offending ship* and should not be restricted to a personal claim against her owners, who may have no substantial interest in her and may be without the means of making due compensation."

II.—By the law of the Admiralty a lien in favor of the party injured follows a tortious collision.

In the *Arturo*, 6 Fed. Rep., 313, Judge Lowell said:

"If a ship in command of a pilot whom it was compelled to take, injures another ship through fault of the pilot, the ship is liable, unless exonerated by statute. If charterers are owners for the voyage, and appoint the master and crew, the ship is liable. If she were navigated by pirates, who had run away with her, she would, in my opinion, be responsible to the injured ship."

In the case of Ralli *v.* Troop, 157 U. S., 403, the *China* case is thus explained:

"That decision proceeded not upon any authority or agency of the pilot derived from the civil law of master and servant, or from the common law as the representative of the owners of the ship and cargo, nor upon the law of contribution in general average as between them; but upon a distinct principle of the maritime law, namely, that the vessel *in whosesoever hands she lawfully is*, is herself considered as the wrong-doer, liable for the tort and subject to a maritime lien for the damages."

This doctrine applies to all vessels, public and private.

In the case of the *Siren* (7 Wall., 152), this Court, speaking by Mr. Justice Field, said:

"For the damages occasioned by collision of vessels at sea a claim is created against the vessel in fault, in

favor of the injured party. This claim may be enforced in the admiralty by a proceeding *in rem*, except where the vessel is the property of the United States. In such case the claim exists equally as if the vessel belonged to a private citizen, but for reasons of public policy, already stated, cannot be enforced by direct proceedings against the vessel. It stands, in that respect, like a claim against the government, incapable of enforcement without its consent, and unavailable for any purpose."

In this case the steamship *Siren* had been captured by the steamship *Gladiolus* while attempting to break the blockade at Charleston, S. C., and was placed in the charge of a prize crew and ordered to Boston. She put into the port of New York for coal, and on her voyage through Hell Gate sank the schooner *Harper*. She was condemned as prize by the U. S. District Court of Massachusetts. The owners of the *Harper* intervened by petition, but the District Court rejected their claim. It was contended that, the vessel being in charge of a prize crew, the doctrine of master and servant did not control, since the Government is never held to respond for the acts of its servants. The Supreme Court reversed the decision of the District Court and held the *Siren* liable for the collision.

Unlike the Federal Government or the State, the City is suable in the admiralty, and is ordinarily liable for the marine torts of all its maritime instrumentalities.

Shields v. *Mayor*, 18 Fed. Rep., 748.

Nevertheless, from considerations of public policy, which make it unseemly and improper to arrest a city vessel which at the time is in municipal employ, the courts will not enforce the lien on the *res*.

In the case of the *Fidelity*, a police boat belonging to the City of New York, the District Court said :

"The question is one of public policy, and the principle involved is that to permit seizure of the tug in this case would endanger the performance of the public duties of the government of the municipality. A lien may exist, and the Court where it has control of the *res* in a proper manner may enforce the lien upon

it; but it will not enforce the lien on the *res* where, in order to obtain such control and sustain the proceeding, the possession of the governmental authority must be invaded under the process of the Court" (9 Ben., 335).

In the same case on appeal Chief Justice Waite said:

"As has already been seen, the public property of a municipal corporation cannot be seized on an execution, although the corporation may be sued to obtain a judgment on which an execution can issue. The simple right to sue, therefore, does not carry with it the right to seize all property. It follows necessarily that the exemption from seizure is not always the same as exemption from suit" (16 Blatchf., 572).

This exemption from actual arrest requires, in order that justice be done, that the corporate owner should be answerable *in personam*.

In the case of Guthrie *v.* City of Philadelphia, 73 F. R., 688, the District Judge said:

'The boat was liable to seizure on the lien arising from her fault and the owner's liability *in admiralty* is a necessary consequence."

III.– The decisions of the State Courts as to the liability of a municipality for the negligence of officers or employees of its departments cannot bind the admiralty.

In the case of *Greenwood* v. *Town of Westport*, 60 Fed. Rep., 577, Judge Townsend of Connecticut said:

"The various decisions of the federal courts hereinbefore cited, and the reasons leading to the conclusions therein, seem to show that where a question of maritime right is presented to an Admiralty Court, that Court, at least in the absence of legislation establishing a contrary rule, may enforce said right and provide remedies for its violation in accordance with the rules of admiralty."

In the case of *Giovanni* v. *The City of Philadelphia*, 59 Fed. Rep., 303, a municipal tug was held liable

for collision. Judge Butler in delivering his opinion said:

"The respondent further defends on the ground that the city is not responsible for the fault of the tug; that the towing of vessels is not a part of the functions imposed on the corporation, but is a public duty exercised for the benefit of the whole public, and cites §980 of 2 Dill. Mun. Corp., in support of this position. The doctrine invoked is old and well understood. It has no application, however, to the facts of this case. *We need not concern ourselves with the question whether courts of admiralty recognize it;* it is sufficient that the tug was not engaged in the discharge of a public duty such as the doctrine contemplates, but in the prosecution of a private enterprise for the respondent's profit under its direction, and in pursuance of its chartered rights. Under such circumstances it is well settled that the municipality is entitled to no immunity" (p. 304). Affirmed 62 F. R., 617.

A municipal ice boat used to break ice in the harbor of Baltimore, through the result of a miscalculation by the master, caused a collision with another vessel.

Judge Morris said in his opinion:

"It is urged that the doctrine of *respondeat superior* does not apply because it is said that this is the case of a municipal corporation in the exercise of its governmental powers performing through its officers a public service from which it derives no special benefit in its corporate capacity." * * * *

"And when in the performance of any duty, either imposed upon or assumed by it, the municipality employs maritime instrumentalities, I think it should be held answerable under the maritime law, with those exceptions only which public policy absolutely requires. If the vessel belonging to the municipality is used by it as a necessary instrument in the exercise of some municipal function, then, as was held by the Chief Justice in the case of the *Fidelity*, public policy requires that the municipality shall not be deprived of its use and therefore the maritime lien cannot attach; but to my mind no sufficient necessity or reason has been suggested for denying a remedy against the municipality as the owner of the offending vessel. * * *

* * It is no argument in favor of denying the injured party his remedy *in personam* against the

owner to say that because of public convenience or necessity, he must not be allowed his lien upon the offending ship, but quite the contrary, and especially in a case in which, but for these considerations of public policy, which prevent the seizure of the ship, he would have the protection both of a privilege against the ship and the responsibility of the owner" (p. 380).

The *F. C. Latrobe*, 28 Fed. Rep., 377 (1886)

It was also held by the same court in the case of Oyster Police Steamers of Maryland (31 Fed. Rep., 763), that the vessels employed by the State in governmental duties were liable for penalties for failure to have inspection of their boilers as required by the Federal law.

Considering the exemptions for cities and other political divisions of the State, which, it was claimed, relieve public vessels from the Federal law, Judge Morris said:

"The result of that rule, so applied, would, therefore, be that no penalty would be enforced for refusal to submit to inspection any of the numerous steam police boats, fire extinguishing steamers, relief boats, ice boats, and other steam vessels used by the large seaboard cities, and they would ply among the vessels in crowded ports and lie at the docks among other shipping free from supervision of any kind prescribed by congressional enactments. The question of public policy would, therefore, not be so narrow a one as might seem upon first impression" (p. 768).

See also Guthrie *v.* City of Philadelphia, 73 F. R., 688 (1896).

Notwithstanding the grant of admiralty jurisdiction conferred by the Constitution upon the Federal Courts to hear and determine actions for collision, the Circuit Court of Appeals holds that the Federal Courts cannot render a decree against a municipality—no matter how gross and culpable has been the mismanagement by which the city boat has destroyed the property of innocent persons.

The exception to the general rule of corporate liability by which the city has escaped answering for the

faults of the *New Yorker* under the decision of the Circuit Court of Appeals is:

"That the officers selected by a municipal corporation to perform a public service for the general welfare of the inhabitants or the community, in which the corporation has no private interest and from which it derives no special benefit or advantage in its corporate capacity, are not to be regarded as the servants or agents of the municipality, and for their negligence or want of skill it cannot be held liable. This is so, notwithstanding such officers derive their appointment from and are paid by the corporation itself. In selecting and employing them the municipality merely performs a political or governmental function; the duties entrusted to them do not relate to the exercise of corporate powers, and hence they are the agents or servants of the public at large."

Opinion, pp. 89–90.

But it is no part of the public or political duties of the State to extinguish fires.

As the learned District Judge said:

"The work of the fire department is not in the least of a general governmental nature, enforced in some form throughout the State for the benefit of the public at large. The extinction of fires is not, and never has been a State function. It has always been done either by volunteer companies, or by such special local organizations as have been formed and authorized to perform this service; or else by local municipalities or boards similarly authorized in particular localities."

Opinion of Judge Brown, p. 80.

Probably the first body of firemen ever organized was by mutual contribution of the Hand in Hand office, created in London in 1696. This association kept in their service for extinguishing fires thirty-five men who were clothed and wore a badge.

The London fire brigade (established in London 1833 and in 1855) was organized and maintained by the different fire insurance companies, and, although at first it had only hand engines, before 1859 it had two floating engines on the Thames.

See Harmony Fire Co. *v.* Trustees, 35 Penn. St., 500.

On the first of January, 1866, the control of the fire brigade and of other fire establishments was devolved on the Metropolitan Board of Works, 28 and 29 Vict., Ch. 70.

The fire organization of Paris was by decree of December 5, 1866. The Court of Cassation has repeatedly held the Commune answerable for damage to private property done by firemen in execution of measures to put out a fire. The Commune is held liable to make good all damage which results from the carrying out of the orders of the duly constituted authority of the Commune. In 1883 a case arose in which firemen broke into an enclosure to get water for their pumps. Their action was not ordered by the officials. The Court of Cassation, however, held that the Commune was bound to indemnify the owner for all his damage, even though the particular firemen who did the injury had come from a neighboring Commune.

> Commune de Charenton *v.* Gillett, 3d January, 1883, Dalloz I., 211. See Appendix C, p. 30.

In our cities and towns, the earliest organizations were voluntary. On account of disorders and riotous proceedings at fires, regulations began to be made after 1840. Municipal fire departments in most Northern cities were established by legislation, and the old volunteer companies disappeared and were succeeded by bodies of trained, uniformed, salaried men with the present improved steam appliances.

IV.—The distinction taken by the State Courts between one city department and another is not reasonable when applied to vessels engaged in navigation.

Contrary to the decisions of Massachusetts and the Courts of several other States, this Court has always held municipal corporations to a strict liability for

breach of their duty as to streets, sidewalks, bridges and wharves.

Providence *v.* Clapp, 17 Howard, 161.
Richardson *v.* Boston, 19 Howard, 263.
Wrightman *v.* Washington, 1 Black, 39.
Chicago *v.* Robbins, 2 Black, 418.
Nebraska *v.* Campbell, 2 Black, 590.
Mayor *v.* Sheffield, 4 Wall., 189.
Barnes *v.* District of Columbia, 91 U. S., 540.
Cleveland *v.* King, 132 U. S., 303.
District of Columbia *v.* Woodbury, 136 U. S., 450.
Washington Gas Light Co. *v.* District of Columbia, 161 U. S., 316.

Respecting the liability for defective sidewalks, this Court, however, in one notable instance followed the law of Michigan, and decided that an individual could not maintain an action for damages against the city of Detroit where such a right of action was not given by the local law. Mr. Justice Brewer said:

"The question presented by it is *not one of general commercial law*, it is purely local in its significance and extent."

Detroit *v.* Osborne, 135 U. S., 492, 498.

As to maritime collisions cognizable in the admiralty the federal grant in the Constitution is especially designed to make the resulting rights and liabilities general and national, and not dependent on the law of a particular port. The owner of a vessel navigating within the admiralty jurisdiction is bound to the same liability in the Admiralty Courts whether his vessel be carrying sweepings from the streets or pumps to a fire. All steam vessels alike are subject to the statutes of Congress, irrespective of the branch or department of the city to which they are applied.

To say that the cleaning of the streets is corporate and that the city is liable for the injury done by its dumping scows or other vessels navigating under the department of streets, but that it is exempt from liabil-

ity for mismanagement of its steam fireboats is a perversion of legal principle which this Court will never sanction.

In the case of Jones *v.* the Mersey Docks, Lord Chancellor Cranworth said:

"It would be a strange distinction to persons coming with their ships to different ports of this country, that in some ports if they sustain damages by the negligence of those who have the management of the docks, they will be entitled to compensation, and in others they will not; such a distinction arising not from any visible difference in the docks themselves, but from some municipal difference in the constitution of the bodies by whom the docks are managed" (L. R., 1 H. of L., 122, 123).

The *Linda Park* and other foreign vessels entering our wharves and engaged in commerce in this port must, under the decision of the Circuit Court of Appeals, accept a still stranger distinction. The boats of the Street Cleaning Department and of the Dock Department (if there are such) are admittedly liable for their faults, but other boats, also a part of the local administration of the city, are free to run into innocent vessels with no remedy to those injured.

The distinction cannot be upheld, that municipal liability depends upon the receipt of gain by the city, thus creating a fund out of which innocent sufferers may receive compensation. While such departments may properly be compelled through the city to make recompense for wrongs suffered, the liability cannot be dependent on the earnings or emoluments of the wrongdoing branch of the municipality. No one contends that the Department of Street Cleaning is a source of revenue. The city, however, is admittedly answerable for any fault of the employees of that department on land or water. The reason given is that the duty of street cleaning is laid upon the city, which gives an individual a right to sue for the breach of that duty. But this distinction of corporate liability has no logical application to a maritime collision.

The liability for failure to clean streets properly or to remove garbage before a residence, may very well

depend on express legislation imposing such a duty on the municipality. But the liability for collision (being a trespass) even at common law, stands on no such distinction. This duty to refrain from running into and destroying the property of another, has its sanction in the fundamental principle that every property owner is bound "to control the use of his property, and to use it in such a manner as not to produce injury to others."

Bailey *v.* Mayor, 2 Denio, 433.

Where the individual is injured by acts of omission the inquiry may well be whether the neglected duty was imposed by statute upon the corporation; but where the act is a violent tort committed or arising from municipal property, the breach of duty appears *ipso facto* in the tort itself—even by the rules of the common law.

Upon this ground, it was held by the General Term of the New York Superior Court that the Metropolitan Fire Department was liable to an action for the negligent explosion of the boiler of a steam fire engine.

Clarissy *v.* Metropolitan Fire Department, 7 Abbott Pr., N. S., 352 (1869).

The duty of the municipal owner of a steamboat to navigate it so as not to collide with a private vessel alongside a wharf, is an instance which Judge Dillon calls a "duty of perfect obligation." This duty is specific, clearly defined and imperative. Even if the boat were employed in the governmental duties of the city, as contradistinguished from its corporate functions, it is not seen how the attribute of irresponsibility could cover such an invasion of private rights as a collision with a helpless vessel alongside a city wharf.

Referring to the New York cases of the Croton Dam, this Court said :

"The struggle in the New York Courts was between the dictates of that evident justice and good sense which required that the city should indemnify a suf-

ferer from the loss arising from the acts of those doing a work under its authority and for its benefit, and the technical rule which exempted it from liability for acts of officers not under its control or appointed by it." Barnes *v.* District of Columbia, 91 U. S., 554.

In this opinion, the very case of a collision was referred to by the Court as an illustration of liability for property where the relation of master and servant did not strictly exist (p. 546).

See Salt Lake City *v.* Hollister, 118 U. S., 256, 262.

In a recent case, where the authorities were elaborately considered, the distinction between the state and federal jurisprudence on this subject was clearly stated:

"And it has been held in Connecticut that a municipal corporation is not liable for the negligent performance of a strictly governmental duty. *Hewison* v. *New Haven*, 37 Conn., 475; *Jewett* v. *New Haven*, 38 Conn., 368. That such exemption from liability is not in harmony with the general rule of liability in this country, nor with the decisions of the federal courts, is settled by the repeated adjudications of the Supreme Court of the United States. *Barnes* v. *District of Columbia*, 91 U. S., 540, citing *Jones* v. *New Haven*, 34 Conn., 1; *Evanston* v. *Gunn*, 99 U. S., 660; *Chicago* v. *Robbins*, 2 Black, 428; *Nebraska City* v. *Campbell*, *Id.* 590; *Weightman* v. *Corporation of Washington*, 1 Black, 50; *City of Detroit* v. *Osborne*, 135 U. S., at page 498, 10 Sup. Ct., 1012. See also *Patton* v. *Montgomery*, 96 Ind., 131; *City of Goshen* v. *Meyers*, 119 Ind., 196, 21 N. E., 657.

Townsend, J., in *Greenwood* v. *Town of Westport*, 60 F. R., 570, 569.

The contention for exemption for damages by collision is similar to the municipal defenses heretofore interposed and overruled by the federal courts where property rights had been invaded.

In 1879 the City of New York resisted liability in the Circuit Court of the United States for this Circuit for the infringement of a patent by the Board of Education. It was stated in the opinion:

"It is argued that upon this proof the city is not liable in this suit for two reasons—one is because these instrumentalities having charge of the schools are corporations themselves, over which the city has no control; the other is that the use is under sovereign authority delegated by the State of New York in its sovereign capacity for which the city or the Board of Education or the Department of Public Instruction can no more be held liable to suit than the State itself."

After discussing the separate incorporation of the Board of Education, the Court said:

"That the acts constituting the infringement were committed in the exercise of the authority derived from the State cannot shield the defendants from liability."

Allen *v.* The Mayor, 17 Blatchf., 350, 352.
Followed in Munson *v.* The Mayor, 3 F. R., 338.
See Gamewell Fire Alarm Co. *v.* The Mayor, 31 Fed. Rep., 312.
Also Bliss *v.* City of Brooklyn, 4 Fisher Patent Cases, 596.

No stronger instance can be cited of the political or governing agency of the State than the construction and maintenance of prisons, jails and penitentiaries. It has been held by the Federal Courts that even such an imperfect and *quasi* corporation as a county is liable to suit for infringement—although the patent was for improvement of prisons.

May *v.* Mercer Co., 30 Fed. Rep., 246.
Also 16 American Law Review, 371.

The effect of these clear expositions of the law of municipal liability is becoming apparent upon the Courts of New York. In Hill *v.* The Mayor, 139 N. Y., 495, 501, the Court unanimously said:

"But to this the city answers that what it has done has been under the authority of law; that as a municipal corporation, engaged in the performance of a public duty, upon which the public health and comfort de-

pends, and acting by express authority of the Legislature, is not liable for consequential injuries resulting to others, even though its acts would amount to a nuisance as between individuals. It cites abundant authority for the general doctrine, running from *Radcliffe* v. *Mayor* (4 N. Y., 195), and *Bellinger* v. *N. Y. Cent. P. R.* (23 *Id.*,42), down to *Atwater* v. *Trustees of Canandaigua* (124 *Id.*, 602). * * "For, consider what the proposition is. It upholds a possible damage to the citizen and denies him any remedy; it infringes his normal and recognized rights with absolute impunity; it sets a nuisance at his door utterly unbearable and requires him to bear it. Surely, an authority which so results should be remarkably strong and clear. In *U. S.* v. *Fisher* (2 Cranch, 390), Chief Justice Marshall said: "Where rights are infringed, where fundamental principles are overthrown, where the general system of the laws is departed from, the legislative intention must be expressed with irresistible clearness to suppose a design to effect such objects." In *Coggswell* v. *N. Y., N. H. & Hart. R. R. Co.* (103 N. Y., 10), Judge Andrews said: "But the statutory sanction which will justify an injury to private property must be express, or must be given by clear and unquestionable implication from the powers expressly conferred, so that it can fairly be said that the legislature contemplated the doing of the very act which occasioned the injury." And in *Bohan* v. *Port Jervis Gas Light Co.* (122 N. Y., 18), the same rule was asserted. * * * "Obviously, the general doctrine which levies upon individuals forced contributions for the benefit of the public, and denies compensation for the injury done, is vulnerable at two points. It is defeated sometimes by construing the harm inflicted into a taking of private property for which compensation must be made, and sometimes by a rigid construction of the authority claimed. *Both methods indicate a lurking doubt of the equity of the general doctrine, and a disposition to narrow the field of its operation.*"

In the latest book which treats the question of the liability of municipalities for torts (Goodnow's Municipal Home Rule, Macmillan Company, 1895), it is said:

"In all these cases" (wharves, water and gasworks, markets and washhouses) "its liability may be based on one of two grounds, viz., that it is managing property, or that the work which is being attended to by

it and in whose management the damage has been done is of local and not general interest, * * * but in almost all cases where municipal corporations have been held liable for tort, with the exception of negligence in the care of streets, the duty whose negligent performance has caused the damage has, as a matter of fact, been performed in connection with municipal property, and, as will be pointed out, *negligence in the management of property of whatever nature is more and more being regarded as a basis for a liability for damages.*"

P. 141-2.

By the English common law there was no remedy for damage incidentally done in extinguishing fire. The loss remained where it fell (Bowditch *v.* Boston, 101 U. S., 16). In case of extraordinary efforts to put out fire, the admiralty allows salvage reward, while at common law there is no compensation, however meritorious the service. It is also intimated by the common law courts, that a private individual is not liable for damage caused by his want of care in efforts to put out a fire. In the Admiralty, however, there is a liability for omitting ordinary precautions. Thus a tug, attempting to tow a burning vessel out into the stream, was held liable for using a hempen hawser instead of a chain.

The *Clarita*, 23 Wallace, 1.

The whole question of extending the immunity of cities to navigation of vessels is now unsettled. By courtesy the lien *in rem* is not enforced by the Courts of Admiralty, since the issue of process is deemed an improper interference with the orderly municipal administration.

Under this decision of the Circuit Court of Appeals, the vessel or property injured by the faulty navigation of a city fire-boat has no redress.

The Department of Education of New York is also held by the State Courts to be political and governmental, as distinguished from corporate, and, therefore, the city is not liable for the tortious acts of its employees in that department.

Among the educational instrumentalities of New York City is the Schoolship *St. Marys*—a training ship which takes long summer cruises in the Atlantic. Suppose this city ship should negligently collide with an innocent vessel. Could it be claimed in this Court, that the liability both *in rem* and *in personam* was taken away by the legislation and decisions of the State of New York, that the Federal Admiralty Courts were powerless to afford any relief?

The fact that the collision in the case at bar occurred within the territorial limits of the City of New York does not affect the question. The *Linda Park* at the time was engaged in foreign commerce. She was run into while on navigable waters within the admiralty jurisdiction. A city or town has no logical attribute of irresponsibility. It is liable for the usual consequence of ownership, and this liability may be enforced by the courts.

How can the position be sustained that the corporate owner of a steam vessel, if navigated contrary to law, is exempt from liability? Surely if the State of New York can exempt a municipal shipowner, it could also exempt any private corporation, and could thus authorize a species of irresponsible vessel ownership, which in other countries is jealously limited to the public armed vessels of foreign sovereignties.

V.—The doctrine of municipal irresponsibility has grown up under the common law, and local statutes.

Even in common law actions, this Court has declared and uniformly held to a stricter rule of liability than the courts of the State of New York. It has also held firmly to the principle that every ship-owner should so use his property as not injure another. The admiralty law of this Court is "Fault creates liability." If the only redress is a suit *in personam*, then the owner must respond to the value of his *res*.

Suppose the offending vessels were actually seized under judicial process, the *China* case is a direct authority deciding that the liability of the owner does not depend on agency, or the relation of master and servant, but is a responsibility incidental to ownership.

Obviously this liability does not turn on the form of process. The proceeding *in rem* does not create the liability, but is only a convenient mode of obtaining security.

It would lead to strange and unjust results to hold that it was necessary to have a seizure *in rem*, in order to recover damages for collision. Suppose for example that the delinquent vessel escapes from the jurisdiction without actual arrest, could it then be maintained that the maritime liability of the owner was thereby displaced, and that a recovery could only be had against the owner under the common law rules of agency, which would result in his escaping liability unless he actually appointed the pilot?

VI.—Just as this Court has enforced contract obligations of municipalities and preserved the credit of our bonded debts, so it is now called on to protect our maritime commerce. Fortunately the city, as a corporation, has no immunity from suit. Either its vessels must be themselves answerable for the wrongs they do, or the corporate owner must respond, like any other ship proprietor, for the damage done by his floating property.

To deny any remedy for collision is to put our ports behind the civilizations of the smallest Continental States and to acknowledge that our laws are unfit to administer justice to innocent sufferers.

VII.—The decree of the Circuit Court of Appeals should be reversed in so far as it relates to the Mayor, Aldermen and Commonalty of the City of New York, and the cause remanded, with a direction to enter a decree for the libellant against the Mayor, etc., as well as against James A. Gallagher, for the amount found due by the District Court, with interest and costs of the Circuit Court of Appeals and of this Court.

April, 1897.

HARRINGTON PUTNAM
CHARLES C. BURLINGHAM
Counsel for Libellant.

Appendix.

A.

LIST OF MUNICIPAL FIRE BOATS IN THE UNITED STATES.

From a paper by H. De B. PARSONS, Esq., read before the Society of Naval Architects and Marine Engineers, Nov. 12th, 1896. Transactions, Vol. IV., p. 52.

Name.	Owner.	Year built.	Material	Length over all.	Beam.
				ft. ins.	ft. ins.
William F. Havemeyer	New York	1875	Wood.	106 0	22 0
William S. Stokley	Philadelphia	1875	Steel.	96 0	17 0
Samuel G. King	Philadelphia	1881	Steel.	80 0	18 0
Zophar Mills	New York	1882	Steel.	125 0	25 0
Chicago	Chicago	1883	Wood.	90 0	18 0
Visitor	Philadelphia	1883	Steel.	75 0	15 0
Seth Low	Brooklyn	1886	Wood.	99 0	23 0
Geyser	Chicago	1886	Wood.	109 0	24 0
George R. Potter	Buffalo	1886	Steel.	80 0	20 0
Yosemite	Chicago	1889	Wood.	109 0	24 0
Number 31	Boston	1889	Wood.	108 0	24 6
Cataract	Milwaukee	1889	Wood.	106 9	24 6
The New Yorker	New York	1890	Steel.	125 6	26 0
Snoqualmie	Seattle	1890	Wood.	90 0	22 6
Cataract	Baltimore	1891	Wood.	85 0	18 6
Fire Queen	Chicago	1892	Wood.	90 0	16 0
John M. Hutchinson	Buffalo	1892	Steel.	80 0	20 0
David A. Boody	Brooklyn	1892	Wood.	105 0	23 0
Edwin S. Stewart	Philadelphia	1893	Steel.	110 0	23 7
Detroiter	Detroit	1893	Wood.	115 0	25 0
James Foley	Milwaukee	1893	Wood.	107 0	24 0
John H. Farley	Cleveland	1894	Steel.	90 0	22 0
Clevelander	Cleveland	1894	Wood.	82 0	21 0
Number 44	Boston	1895	Wood.	110 0	26 0

B.

Provisions of the Act consolidating the Charter of the City of New York. Laws of New York, 1882, Chapter 410.

§ 26. The corporation now existing and known by the name of the mayor, aldermen and commonalty of the city of New York, as formed by the consolidation of the county of New York with the body previously known by the name of the mayor, aldermen and commonalty of the city of New York, by the act passed April thirtieth, eighteen hundred and seventy-four, entitled "An act to consolidate the government of the city and county of New York, and further to regulate the same," shall continue to be a body politic and corporate, in fact and in name, by the same name, and have perpetual succession, with all the rights, property, interests, claims, demands, grants, powers and privileges heretofore held by the mayor, aldermen and commonalty of the city of New York, and not modified or repealed by the provisions of this act.

§ 27. For all purposes the local administration and government of the city and county of New York shall continue to be in and be performed by the corporation aforesaid. All charges and liabilities now existing against said county, or which may hereafter arise or accrue in said city and county of New York, and which, but for this act, or the act entitled "An act to consolidate the government of the city and county of New York, and further to regulate the same," passed April thirtieth, eighteen hundred and seventy-four, would be charges against or liabilities of said county, shall be deemed and taken to be charges against or liabilities of said corporation, and shall be defrayed or answered unto by it. All bonds, stocks, contracts and obligations of the said county, and of the board of supervisors which now exist as legal obligations, shall be deemed such of and against the said corporation, and all such that may be authorized or required to be hereafter issued or entered into, shall be issued or entered into by and in the name of the said corporation. Nothing in this section contained shall be construed to affect the election or appointment of county officers whose election or appointment is provided for by the constitution of this state, or any other purposes for which the city and county of New York is recognized in the constitution as one of the counties of this state.

§ 30. The executive power of the corporation shall be vested in the mayor and the officers of the departments.

§ 31. The mayor shall be the chief executive officer of the corporation; he shall be elected at a general state election, and hold his office for the term of two years, commencing at noon on the first day of January next after his election.

§ 34. There shall be the following other departments in said city:
Finance department.
Law department.
Police department.
Department of public works.
Department of public charities and correction.
Fire department.
Health department.
Department of public parks.
Department of taxes and assessments.
Department of docks.
Department of street cleaning.

§ 40. The head of the fire department shall be called the board of fire commissioners. Said board shall consist of three persons, to be known as fire commissioners of the city of New York, who shall, unless sooner removed, respectively hold their offices for six years, and until their successors shall be respectively appointed and have qualified.

§ 123. The finance department shall have control of the fiscal concerns of the corporation. All accounts rendered to or kept in the other departments shall be subject to the inspection and revision of the officers of this department. It shall prescribe the forms of keeping and rendering all city accounts, and, except as herein otherwise provided, the manner in which all salaries shall be drawn, and the mode by which all creditors, officers, and employees of the corporation shall be paid. All payments by or on behalf of the corporation, except as otherwise specially provided, shall be made through the proper disbursing officer of the department of finance, on vouchers to be filed in said department, by means of warrants drawn on the chamberlain by the comptroller, and countersigned by the mayor. The comptroller may require any person presenting for settlement an account or

claim against the corporation to be sworn before him touching such account of claim, and when so sworn, to answer orally as to any facts relative to the justness of such account or claim. Willful false swearing before him is perjury, and punishable as such. He shall settle and adjust all claims in favor of or against the corporation, and all accounts in which the corporation is concerned as debtor or creditor; but in adjusting and settling such claims, he shall, as far as practicable, be governed by the rules of law and principles of equity which prevail in courts of justice. The power hereby given to settle and adjust such claims shall not be construed to give such settlement and adjustment the binding effect of a judgment or decree, nor to authorize the comptroller to dispute the amount of any salary established by or under the authority of any officer or department authorized to establish the same, nor to question the due performance of his duties by such officer, except when necessary to prevent fraud. The comptroller shall not reduce the rate of interest upon any taxes or assessments below the amount fixed by law. No contract hereafter made, the expense of the execution of which is not by law or ordinance, in whole or in part, to be paid by assessments upon the property benefited, shall be binding or of any force or effect, unless the comptroller shall indorse thereon his certificate that there remains unexpended and unapplied, as herein provided, a balance of the appropriation applicable thereto, sufficient to pay the estimated expense of executing such contract as certified by the officer making the same. But this provision shall not apply to work done, or supplies furnished, not involving the expenditure of more than one thousand dollars. It shall be the duty of the comptroller to make such indorsement upon every such contract so presented to him, if there remains unapplied and unexpended such amount so specified by the officer making the contract, and to thereafter hold and retain suchsum to pay the expense incurred until the said contract shall be fully performed. And snch indorsement shall be sufficient evidence of such appropriation in any action. The comptroller shall furnish to each head of department, weekly, a statement of the unexpended balances of the appropriation for his department. Wages and salaries, including payments for the board of education, may be paid upon pay-rolls, upon which each person named thereon shall separately receipt for the amount paid to such person, and in every case of payment upon a pay-roll, the warrant for the aggregate amount

of wages and salaries included therein may be made payable to the superintendent, principal, teacher, foreman, or other officer designated for the purpose. The comptroller shall enter into, on behalf of the mayor, aldermen, and commonalty of the city, any lease authorized by the commissioners of the sinking fund of property leased to the city.

§ 193. If a final judgment for a sum of money, or directing the payment of money, shall have been, or shall hereafter be recovered against said city, and the same remains, or shall hereafter remain unpaid, and the execution thereof is not, or shall not be stayed as required by law, or if so stayed, the stay has expired, or shall hereafter expire, it shall be the duty of the board of estimate and apportionment, and the said board is hereby empowered to assess, levy, and cause to be collected at the same time and in like manner as other moneys for the necessary expenses of the city are then next thereafter to be assessed, levied, and collected, and in addition to the moneys now authorized by law to be assessed, levied, and collected for that purpose, a sum of money sufficient to pay the said judgment, with the interest thereupon, and the fees and expenses chargeable by law upon the execution, if any, issued to collect the same. The moneys so assessed and levied as soon as collected and paid to the proper receiving and disbursing officer or officers, or so much thereof as may be necessary, shall, from time to time, be paid by him or them to the judgment creditor, administrator or assignee, or other person entitled to receive the same by reason of the said judgment, without any deduction for his or their fees or commissions. No restriction or limitation imposed by law as to the sum to be raised in any year shall apply to the moneys to be raised for the purposes specified in this section; but the said moneys shall be raised in addition to any sum so restricted or limited.

CHAPTER XI.

The Fire Department.

§ 424. The board of fire commissioners shall possess and exercise, fully and exclusively, all powers, and perform all duties for the government, management, maintenance, and direction of the fire department of the city, and the premises and property thereof. The said department shall have sole and exclusive power and authority to extinguish fires in said city. All real estate, fire apparatus, hose, implements, tools, bells and bell towers, fire telegraph, and all property of whatever nature in use by the firemen or fire department of the city, belonging to said city, shall be in the keeping and custody of the fire department, and for the use of said department. But the said property shall remain the property of the mayor, aldermen and commonalty of the city of New York, subject to the public uses of said department, as aforesaid, and for the purposes provided by this chapter. And whenever any of the said property shall no longer be needed by the said department for the purposes of this chapter they shall surrender the same to the said the mayor, aldermen and commonalty.

§ 425. The said board shall, subject to the other provisions of this act, have full power to provide supplies, horses, tools, implements, and apparatus of any and all kinds (to be used in the extinguishing of fires), and fire telegraphs, to provide suitable locations for the same, and to buy, sell, construct, repair, and have the care of the same, and take any and all such action in the premises as may be reasonably necessary and proper.

§ 426. The board shall possess and exercise full and exclusive power and discretion for the government, management, maintenance, and direction of the several buildings and premises, and bell-towers, and property, and appurtenances thereto, and all apparatus, hose, implements, and tools of any and all kinds which may belong to or be in the use of the said department.

§ 430. The said board of fire commissioners shall, subject to the other provisions of this act, provide such offices and business accommodation as may be requisite for the transaction of the business of the department, and that of its subordinates. The department may adopt a common seal and direct its use.

§ 431. The board of fire commissioners is hereby authorized, empowered, and especially charged with the duties of enforcing the several provisions of this chapter, and may, subject to the other provisions of this act, incur any expense necessary and proper therefor; and said board is hereby authorized and empowered to receive and collect all license fees mentioned in this chapter, and to sue for, and shall have the exclusive right of recovery of, any and all penalties imposed under this chapter, and may sue for and recover and collect the same, with costs, in the manner provided for in actions under the Code of Civil Procedure, and shall apply the same to the uses and purposes of the relief fund of the fire department in the city of New York, and the said board may bring any suit or action for the enforcement of its rights and contracts, and for the protection, possession, and maintenance of the property under the control of said department; and any action to recover any fee, fine, or penalty under this chapter may be brought in any of the district courts in said city; and the attorney to the fire department shall, under the direction of said board, take charge of the prosecution of all suits or proceedings instituted for the recovery and collection of penalties, and the enforcement of the several provisions of this chapter; collect and receive all moneys upon judgments, suits, or proceedings so instituted; pay all costs and disbursements, and discontinue suits and proceedings, and execute satisfaction of judgments upon payment of penalties or costs, and in compliance with orders made in such suits and proceedings; shall keep a correct and accurate register of all suits and proceedings, and account for all moneys received and paid out thereon; and shall pay over to the treasurer of the relief fund the amount of all license fees, penalties, and moneys received and collected by him, and the said board is authorized to settle or compromise any such suit or judgment for less than the amount of the same, in case, in their judgment, they are satisfied that payment of the full amount cannot be collected.

§ 440. The government and discipline of the fire department shall be such as the board may, from time to time, by rules, regulations, and orders prescribe. The board shall have power, in its discretion, on conviction of a member of the force of any legal offense or neglect of duty, or violation of rules, or neglect or disobedience of orders, or incapacity, or absence without leave, or any conduct injurious to the public peace

or welfare, or immoral conduct, or conduct unbecoming an officer, or other breach of discipline, to punish the offending party, by reprimand, forfeiting and withholding pay for a specified time, or dismissal from the force; but no more than ten days' pay shall be forfeited and withheld for any offense. Officers and members of the uniformed force shall be removable only after written charges shall have been preferred against them, and after the charges have been publicly examined into, upon such reasonable notice to the person charged, and in such manner of examination as the rules and regulations of the Board of Fire Commissioners may prescribe.

§ 441. An intention to reduce the force and expense of the bureau of inspection of buildings, or the clerical force of the department, shall be deemed sufficient ground for the removal of any officer or employee of said bureau, except the chief officer thereof, and of any clerk in the department. The Board of Fire Commissioners is authorized to abolish any office, clerkship or employment in the said bureau of inspection of buildings, and they may consolidate the duties of any two or more officers, clerks or employees thereof.

§ 442. The salary attached to either of the following positions in the fire department shall not exceed the sum here designated as the maximum salary of such position when held by any person appointed to the uniform force of said fire department after May twenty-ninth, eighteen hundred and eighty: For chief of battalion, two thousand dollars; for a foreman, fourteen hundred dollars; for an assistant foreman, thirteen hundred dollars; for an engineer of steamers, twelve hundred dollars; for an assistant engineer of steamers, eleven hundred dollars. The members of the uniform force, appointed after May twenty-ninth, eighteen hundred and eighty, shall, on their appointment, become members of what shall be known as the third grade, at a salary of eight hundred dollars per year; after two years of service in such third grade, they shall, if their conduct and efficiency have been satisfactory, be advanced to what shall be known as the second grade, at a salary of nine hundred dollars per year; after two years' service in such grade, they shall, on like conditions, be advanced to what shall be known as the first grade, at a salary of one thousand dollars per year. But no member of such uniformed force shall be so advanced, as aforesaid, except after examination and approval of his record, efficiency and conduct by the Board of Fire Commissioners.

C.

Decision of the French Court of Cassation, Holding the Commune Liable to a Private Person for Acts of Firemen.

"*Les compagnies de pompiers étant des institutions communales qui fonctionnent sous la surveillance de l'autorité municipale, il en résulte que les mesures prises par les pompiers, pour l'extinction d'un incendie et dans l'ordre de leur service, engagent la responsabilité de la commune à l'égard des particuliers dont les propriétés, placées hors des atteintes du feu, ont subi un dommage par suite de l'exécution de ces mesures* (*c. civ. 545, 1382, 1384; L. 16-24 août 1790. tit. 11, art. 3-5; L. 10 vend. an 4 tit. 4, art. 1 et 2; L. 11 frim. an 7, art. 4; Décr. 29, déc. 1875, art. 3*).

Spécialement, lorsque des pompiers ont brisé la porte d'une propriété pour se procurer l'eau nécessaire à l'alimentation de leurs pompes, la commune est tenue d'indemniser le propriétaire des dégradations ainsi commises.

Et il importe que que ces dégradations aient eu lieu en dehors de toute intervention de l'autorité municipale et par le fait d'un pompier étranger à la compagnie de la commune.

(Commune de Charenton *C.* Gillett.)

Un incendie ayant éclaté, dans la nuit du 23 au 24 janv. 1880, à Charenton, dans l'usine d'un sieur Verstraëte, les pompiers ont, pour chercher de l'eau nécessaire à leurs pompes, brisé la porte charretière d'une propriété voisine appartenant au sieur Gillett. Celui-ci a assigné la commune de Charenton en réparation de ce préjudice, et, le 24 déc. 1881, le tribunal civil de la Seine a condamné celle-ci à lui payer 600 fr. à titre de dommages-intérêts.

* * * * *

Arrêt

La Cour: Sur le moyen unique, tiré de la violation ou fausse application des art. 10, 11 et 30 de la loi du 18 juill. 1837, 5 et 21 du décret du 29 déc. 1875, art. 3, § 5, tit. 11, de la loi du 16-24 aout 1790, 1 et 2 du tit. 4 de la loi du 10 vend. an 4, 1382 et 1384 c, civ.: Attendu que le

jugement attaqué déclare, en fait, que, dans la nuit du 23 au 24 janv. 1880, un incendie s'est déclaré à Charenton, dans l'usine du sieur Verstraëte, et que des pompiers régulièrement appelés ont, dans le but de chercher l'eau nécessaire pour alimenter les pompes, brisé la porte charretière d'une propriété voisine, appartenant au sieur Gillett. Attendu qu'il résulte des dispositions combinées du décret du 29 déc. 1875 que les compagnies de sapeurs-pompiers sont des institutions essentiellement communales ; qu'elles relèvent du ministere de l'intérieur et fonctionnent sous la surveillance de l'autorité municipale. Qu'elles ont pour mission, en se prêtant un mutuel concours, de défendre les personnes et les propriétés contre les ravages de l'incendie;—Que, par suite, lorsque ces compagnies se réunissent sur un point menacé, afin d'y organiser les secours réclamés par les habitants, les individus qui les composent, soit qu'ils résident dans la localité, soit qu'ils y aient été momentanément appelés, agissent, dans l'ordre de leur service, comme représentants ou agents de la commune qui les emploie;—Attendu que, dans l'état des faits constatés par le jugement attaqué les juges du fond ont, à bon droit, considéré la commune de Charenton comme obligée envers Gillett à concurrence du dommage résultant pour lui d'une mesure exécutée en vue de la conservation de tous, et qu'en prononçant contre ladite commune la condamnation visée au pourvoi, le tribunal civil de la Seine, loin de violer aucune loi, a fait une saine application du principe écrit dans l'art. 545 c. civ. ;—Par ces motifs, rejette.

Du 3 janv. 1883—Ch. req.—MM. Bédarrides, pr.-Alméras Latour, rap.—Chévrier, av. gén. c. conf.—Choppard, av."

Dalloz, Jurisp. Générale, year 1883, Part 1, p. 211.

No. 4. Pp. 1

Sup. Brf. of Putnam & Burlingham for Appellee.

Supreme Court U. S.
FILED
MAR 9 1899
JAMES H. MCKENNEY
Clerk.

Filed Mar. 9, 1899.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1898

The Mayor, Aldermen and Commonalty of New York

against

Robert W. Workman

No. 4

SUPPLEMENTAL BRIEF FOR THE LIBELLANT

HARRINGTON PUTNAM
CHARLES C. BURLINGHAM
Advocates

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1898.

The Mayor, Aldermen and Commonalty of the City of New York and James A. Gallagher,
Appellants,
vs.
Robert W. Workman,
Libellant-Appellee.
No. 4.

On a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

SUPPLEMENTARY BRIEF FOR LIBELLANT ON REARGUMENT.

The exemptions of municipalities for the acts of their servants depend on the conflicting views of the common law courts in different States. In Massachusetts, where towns and cities had but limited and *quasi* corporate powers, generally the city is not responsible for the negligent acts of its officials. Other States extend the scope of corporate powers and give correspondingly greater remedies to an injured party.

THE SUPPOSED DANGER OF AN INDEFINITE AND RUINOUS LIABILITY FOR THE ACTS OF A FIRE DEPARTMENT.

The ground for excluding the neglects of firemen from the class of answerable and remediable torts by a city's servants is the fear of admitting a liability which may be capable of dangerous extension.

Once make a city pay for driving a hose-cart upon the sidewalk, and what follows? You open the door to suits for the inefficiency of the whole fire department, including all its ap-

paratus and equipment, and even the water supply. In case of a conflagration the city might thereby be bankrupt. It is such a possibility as this which has held back certain Courts from giving any recovery for the negligence of the employees of the fire department.

Although the Court of Appeals of the State of New York has never directly decided this precise point, its reasoning has frankly led in this direction. In Fire Ins. Co. *v.* Village of Keeseville, 148 N. Y., 46, 32, Judge Gray remarked:

"While the efficiency of the public service would be promoted by holding municipal corporations to the exercise of reasonable care and diligence in the performance of municipal duties and to a liability for injury resulting from a failure in such exercise, the application of that doctrine to such a case as this, might, and probably would, be highly disastrous to municipal governments. A little reflection will show that a multitude of actions would be encouraged by fire insurance companies as by individuals, and that cases have arisen, and may still arise, where an extensive conflagration might bankrupt the municipality, if it could be rendered liable for the damages or losses sustained."

The maritime liability of a vessel owner has no indefinite and ruinous obligation for damage. It is limited to the value of the owner's interest in the vessel, and her pending earnings. Thus the argument that has sometimes checked our common law courts from following the rule *Ubi jus ibi remedium* has no application to the case of a ship owner in admiralty.

Liability of a vessel owner recognized at common law, as well as in the Admiralty.

This liability of a vessel owner, regardless of the relation of master and servant, is not alone in the admiralty. It appears also in the English common law decisions.

In 1804 a collision occurred with a ship chartered to the Commissioners of the navy, who had put on board a naval com-

mander with a king's pilot who was at the time giving orders to the seamen. A suit was brought against the owners, who defended on the ground that they had surrendered all control of the vessel to the navy, and that they were not answerable for the neglects of those officials of the Government. It was argued for the plaintiff that *prima facie* the owners were answerable.

"It is incumbent on them to point out some other person who is liable if they are not so. The injury having been occasioned by there being too much cable on board the charge does not fall on any person individually but on the owners of the ship, on board of which there appears to have been an improper execution of a proper order owing to which the injury ensued. The soundest policy is to hold the owners liable in all cases in which their liability is not clearly removed."

For the defendants it was urged:

"It seems to be assumed that the owners of ships stand in a different situation from other persons who are owners of any other sort of personal property; and that they are liable not only for the acts of their own servants, but for the acts of the servants of those to whom they have for temporary purposes surrendered the control of the property."

Sir James Mansfield, in giving judgment, said:

"On the whole, it appears to the Court that this ship, notwithstanding it had an officer on board, is with regard to third persons to be considered as the ship of the owners; and that they are therefore answerable for damage done by their ship." Fletcher *v.* Braddick, 5 Bos. & Puller, 182, 187.

Other decisions holding the shipowner liable for the neglects of a government pilot are:

Yates *v.* Brown, 8 Pick., 23.
Bussey *v.* Donaldson, 4 Dallas, 204.
Williamson *v.* Price, 16 Martin (La.), 399.

The law of Belgium is specially connected with the decision of this Court in the *China* (7 Wallace, 53). The opinion quotes

with approval the judgment of Dr. Phillimore in the *Halley* (L. R., 2 A. & E., 3) in which the plea had been sustained, that by the Belgian law compulsory pilotage was no defense to the liability for collision.

The decree which settled this rule for Belgium (and was followed also in Holland) was rendered August 14th, 1846.

Having discussed the points raised by the defendant shipowner, and the official character of the pilot, the continental court pointed out that the resulting liability from the fact of ownership, without the relation of agency, was in analogy to other familiar legal principles.

"Qu'il existe en droit divers exemples de responsabilité encourue par les propriétaires d'une chose inanimée. (Art. 1386 Code Civil, 407, 417 et suivants du code de commerce); qu'il serait donc exorbitant de décharger de la responsabilité d'un abordage le propriétaire d'un navire, lorsqu'il le fait naviguer dans son intérêt, sous la conduite d'un pilote expert dont il accepte les services conformément aux lois et usages."—Jurisp. du Port d'Anvers, 1856, 1, 189.

That there exist in the law many instances of liability incurred by owners of an inanimate object (citing the civil and commercial codes).

That it would therefore be unreasonable to discharge the owner from the collision liability of a ship, which he allows to navigate in his interest, under charge of an expert pilot, whose services he accepts according to law and custom.

In 1858, a collision occurred near Marseilles between a Neapolitan brig, in charge of a pilot, and a French sailing vessel. On the defense of compulsory pilotage the French Court said:

"Attendu que le capitaine du brick napolitain se prévaut encore de la présence d'un pilote qui dirigeait son navire lors de l'abordage, pour en décliner la responsabilité;

Attendu qu'il ne s'agit point dans la cause de la responsa-

Whereas the master of the Neapolitan brig raises the further point of the presence of a pilot, who had directed his vessel at time of the collision, in order to free himself from liability;

Whereas the cause turns not

bilité personelle de ce capitaine, mais de sa responsabilité en nom qualifié, comme représentant l'armement;

Que cette responsabilité est indépendante de la considération de la personne qui conduisait le navire;"—Journal de Marseille, 1859, 1, 68, 69.

upon the personal responsibility of the master, but on his responsibility in his official designation, as representing the owners;

That this responsibility is independent of the consideration of the person who had charge of the vessel.

As was said recently by the Supreme Court of Massachusetts:

"The pilot is engaged in the navigation of the ship, for which, on grounds of public policy, the owners should be held responsible."

O'Brien *v.* Cunard Line, 154 Mass., 276, 277.

The learned District Judge, in the first part of his decision, states the principle:

"By the *maritime* law, both the vessel and the owner are ordinarily liable for such a marine tort." (Record, p. 77.)

As Lord Watson said:

"Such an act or manœuvre is necessarily due to the want of skill or negligence of the persons by whom the vessel is navigated, but it is, in the language of the maritime law, *attributed to the ship*, because the ship, in their negligent and unskilful hands, is the instrument that causes the damage." Currie *v.* McKnight, [1897] Appeal Cases, 97, 107.

This has been approved by this Court, and the doctrine explicitly stated:

"The foundation of the rule that a collision gives to the party injured a *jus in re* in the offending ship is the principle of the maritime law that the ship, *by whomsoever owned or navigated*, is considered as herself the wrongdoer, liable for the tort and subject to a maritime lien for the damages. This principle, as has been observed by careful text writers on both sides of the Atlantic, has been more clearly established, and more fully carried out, in this country than in England."

The *J. G. Stevens*, 170 U. S., 113, 120.

UNIFORMITY ESSENTIAL IN THE ADMIRALTY.

While the owners should always be answerable for damage "by their ship," it is in the maritime courts that this principle is generally accepted. For that, among other reasons, the necessity for maritime courts administering one and the same system of law has been long recognized.

Thus Exton, Judge of the Court of Admiralty, in his treatise called The Maritime Dicæologie, or Sea Jurisdiction of England, wrote:

"I shall but once again put you in mind of what hath been already said concerning the necessity of upholding one and the same law in all nations in maritime causes, for one nation's rendring of the same justice to another that it doth from thence receive, which is the chiefest thing that maintaineth the community of traffic and commerce, which cannot possibly be done if the same should be rendred by the various fancies of men, in no wise guided by any certain form or rule but by that thing (than which nothing can be more uncertain) which men call opinion: *tot capita, tot sententiæ*" p. 223 (Ed. London, 1755).

Pardessus thus speaks of this harmony in the maritime law of different countries:

"Produites en tout pays par des besoins semblables, elles tiennent de cette circonstance même un caractère d'universalité qui permet de leur appliquer ce que Cicéron a si bien dit du droit naturel, *Non opinione, sed naturâ jus constituitur:* et comme elles intéressent l'univers, dans lequel les navigateurs forment, pour ainsi dire, une seule famille, leur esprit ne sauroit changer avec les démarcations territoriales: elles doivent être partout les mêmes, parce que partout leur prévoyance hospitalière doit offrir les mêmes garanties aux étrangers qu'aux nationaux.

"Le plus mauvais code civil seroit sans contredit celui qu'on destineroit à tous les peuples indistinctement; le plus mauvais code maritime, celui qui n'auroit été dicté que par l'intérêt spécial et l'influence particulière des mœurs d'un seul peuple." Collection de lois maritimes, chapitre préliminaire, tome 1, p. 3. Paris 1828.

It was to secure this uniformity in maritime law that the grant in our Constitution was made to the United States of all causes of admiralty and maritime jurisdiction. The experience of the differing State admiralty courts during the Confederation was then fresh in popular memory.

Penhallow *v.* Doane, 3 Dallas, 54.

Justice Story refers particularly to collisions and like causes in admiralty, and says of the clause giving the jurisdiction to the United States Courts:

"There is therefore a peculiar fitness in appropriating this class of cases to the national tribunals, since they will be more likely to be there decided upon large and comprehensive principles, and to receive a more uniform adjudication, and thus to become more satisfactory to foreigners."

Commentaries on the Constitution, §1670.

The necessity for this uniformity is recognized in all the steps to form the Constitution, from the first draft proposed by Pinckney to the completed instrument. It was a frequent remark of the fathers that to this unifying force in maritime matters we may be said to owe the continued existence of the Union itself.

"How easy it is to perceive that our harmony may be interrupted and our strength impaired, if each State may adopt and enforce on its half of a river—its section of a lake—its short stretch of coast—in its own ports and harbors and local waters—to which all the States have a common right of use—a system of commercial and maritime law repealing or conflicting with that great system of commercial law which is known as the Admiralty and Maritime law, and which alone can secure those equal State rights which it was the one great object of the Constitution to protect."

Benedict's Admiralty, §208.

Should the decision of the Circuit Court of Appeals stand, what becomes of this cherished Constitutional safeguard? The law of our ports and harbors will no more follow the federal

courts. The comprehensive wisdom of the Constitution, that this court should ordain and establish a law of admiralty, fixed, uniform and unchanging, will have failed. The Rules of the Road, legislation of congress, and even the solemn sentences of the federal tribunals will be unheeded by the steam vessels owned by the great municipalities. No more can it be said that this Court, in matters maritime, speaks *urbi et orbi!*

As the remedy would vary with the differing State laws, the suitor in effect would be remitted to the confusion and chaos that characterized the maritime tribunals erected by the States under the Articles of Confederation.

This danger has been guarded against in former decisions of the federal courts.

The *Lottawanna*, 21 Wall., 580.
The *J. E. Rumball*, 148 U. S., 1.
Moran *v.* Sturges, 154 U. S., 256.
Butler *v.* Boston S. Co., 130 U. S., 527, 556.

Thus the admiralty protects maritime liens which arise during the control of a State receivership.

The *Resolute*, 69 F. R., 742.

In the *Avon* (Brown's Ad. Reports, 170, 192) the principle is declared:

"The general rule in reference to ships, as we understand it, is not to yield the maritime law to any doubtful suggestions of the local power; and in no case to do so, where its invasions are unjust and injurious to the general interests of commerce."

See also the *Henrietta New*, Newb., 241.

The Circuit Court of Appeals has been led into a curious fallacy. The collision liability of a shipowner antedates all the technicalities of municipal departments. Its basis is real rather than personal. After having been taken as an axiom—quoted, too, in common law courts in support of the salutary rule that ownership of property carries with it liability—the

very courts that have builded on its logic are now asked to disregard this fundamental principle in favor of those municipal encroachments, against which this maxim has been an effective bulwark. For in Bailey *v.* The Mayor, 2 Denio, 433, 449, and in Barnes *v.* Columbia, 91 U. S., 540, 546, this collision liability for acts of a compulsory pilot was held the ground for holding a city liable, as owner, for acts of a Board of Commissioners appointed by compulsion of law. In face of this line of authority the Circuit Court of Appeals has denied this premise. It bases the admiralty liability of a shipowner for collision on the subversive technicalities that this Court has rejected even in regard to civic liability on the land!

Can steam vessels find immunity for collision by the easy device of State legislation, placing the title of ships away from the responsible management? Any decisions of a State court wrested from their true scope, so as to free a steam fire boat from collision, would become spoliatory diplomas, indeed judicial letters of marque, against the commerce of the port!

There is no reason for this deference to the State courts because this is a suit *in personam* and not *in rem*. Indeed, the suit *in rem* is the exception. The continental tribunals do not know it. The suit against the owner, or the master, as party defendant, is the ancient procedure, by which the liability of the vessel is worked out.

Even in a suit *in personam* against Spanish ship-owners, they were not allowed to defend by pleading the law of Spain, under which they were freed from liability.

The *Leon*, L. R., 6 P. D., 148.

THESE DIFFERING STATE SYSTEMS NOT STEADFAST.

The law of immunity for different subdivisions of the modern city rests on no sound principle, and is therefore subject to change more and more in the direction of placing large depart-

ments beyond the reach of suitors. How, then, can the federal courts follow such uncertain and shifting guides? In the attempt to do so the United States Circuit Court (Judge Wallace) in 1889 held the city liable in admiralty for torts of steam vessels engaged in the Department of Street Cleaning.

Barney Dumping Boat Co. *v.* The Mayor, 40 F. R., 50.

But his *ratio sententiæ* has since been taken away. The courts of common law in New York now hold that street cleaning is a matter of public health, and that the duties thereby undertaken by the city therefore are not corporate. Fortified by the decision in the case at bar (Mayor *v.* Workman, 67 F. R, 348), it is now held that one struck by an ash cart, in the employ of the street cleaning department, has no redress.

Bishop *v.* The Mayor, 21 Misc. (Delehanty) Rep., 598.

THE RULE IN GREAT BRITAIN.

In England, the tendency is against shielding public servants from liability for negligence. Thus local boards, public officers, and public corporations, charged with a statutory duty, must answer in damages to anyone injured by negligence in the performance of that duty.

Smith *v.* West Derby Local Board, 3 C. P. Div., 423.
White *v.* Hindley Local Board, L. R., 10 Q. B., 219.
Ohrby *v.* Ryde Commissioners, 5 B. & S., 743; 10 Jur. N. S., 1040.
Foreman *v.* Canterbury, L. R., 6 Q. B., 214.
Reney *v.* Magistrates of Kirkcudbright [1892], A. C. 264.

The corporation of the Trinity House—which performs governmental functions, like those of the Lighthouse and pilotage boards of other countries, and is charged also with buoying channels and wrecks—is not regarded as a servant of the Crown, so

as to be exempt from responding in damages for bad navigation of its vessels or neglect in regard to buoys.

Romney *v.* Trinity House, L. R., 5 Excheq., 204; 7 do, 247.

Gilbert *v.* Same, 17 Queen's Bench Div., 795.

The Metropolitan Board of Works are held liable for the negligence of the officers of a fire-brigade while engaged in extinguishing fires. Even in the extraordinary instance of the failure of such officers to restrain the firemen from feloniously taking wine from a London restaurant, during a fire, a judgment was sustained against the Board.

Joyce *v.* The Metropolitan Board of Works, 44 Law Times, 811 (1881).

THE ENLARGED POWERS OF MODERN MUNICIPALITIES.

The rapid extension of the powers of great cities—their entry into new industrial fields, where they supplant individual enterprises—show the dangerous scope of the immunities now claimed.

The modern municipality owns and directs water-works, street-railways, gas and electric lighting, sewers, parks, abattoirs, and markets.

On the water, it has tugs and scows for garbage disposal, stationary and floating docks, public bath and wash-houses, with schoolships for training in seamanship. A seaboard city may incidentally maintain a fleet of vessels for its police, charity, and harbor functions.

Ferries are now coming directly under city operation. That from Liverpool to Birkenhead, consisting of seven large steamers, is owned and run by the corporation of Birkenhead. The Trustees of the Clyde Navigation also carry on the ferries of Glasgow, as do the local Harbor Commissioners those of Belfast. The London County Council maintains and operates a free ferry over the Thames at Woolwich.

This tendency to confer new powers upon cities is supposed to make for economy, and improved service, with increased public welfare. But none of these ends can be rightly attained by the disregard of the obligations of ownership. With new functions must follow new responsibilities. To deny to the individual proper redress because the neglect, otherwise actionable, was on the part of a hydra-headed municipality is to oppose true urban development.

Whatever regretable *lacunæ* there may be in the system of the Courts of common law, there should be none in the admiralty. On the water no discrimination is made between the maritime instrumentalities of different departments having a common municipal ownership. In the ancient law of the sea all such boats are equal. Only armed vessels of the sovereign are beyond the Courts.

THE DRAWBRIDGE CASES.

By the common law, the liability of the municipal owner is uncertain and varying. In Massachusetts, the city is not liable. (French *v.* Boston, 129 Mass., 592; Butterfield *v.* Same, 148 do., 544.) On the contrary, in Illinois and Wisconsin the liability is settled (Scott *v.* Chicago, 1 Biss., 510; Weisenberg *v.* Town of Winneconne, 56 Wisc., 667; Stephani *v.* Manitowoc, 89 Wisc., 467). It is still more doubtful as to counties. Regarding bridges, it has been authoritatively stated that "the common law responsibility of counties has never prevailed in the United States." (Dillon, Municipal Corporations, 4th ed., §729 n.)

In striking contrast to this *vaga aut incerta lex,* is the established rule of the maritime law. A certain remedy is given in the admiralty, although it cannot proceed *in rem.* (The *Rock Island Bridge,* 6 Wall., 213.)

Vessels damaged by such bridges recover *in personam* against the muncipality.

Etheridge *v.* City of Philadelphia, 26 Fed. Rep., 43, Judge Butler.

Edgerton *v.* The Mayor, 27 Fed. Rep., 230, Judge Brown.

City of Boston *v.* Crowley, 38 F. R., 202, Judge Colt.

Manistee Co. *v.* City of Chicago, 44 F. R., 87, Judge Blodgett.

Hill *v.* Board of Freeholders, 45 F. R., 260, Judge Green.

Greenwood *v.* Town of Westport, 60 F. R., 560, Judge Townsend.

The principle of these decisions is well stated by Colt, J.:

"Nor can I agree to the proposition that in the federal courts the only remedy for wrongs of this character against *quasi* corporations such as cities, unless a right of action is conferred by statute, is by indictment. The contrary of this has long been established. Wrightman *v.* Washington, 1 Black, 39," and other cases.

See also Oregon *v.* Columbia S. Co., 53 F. R., 549.

Notwithstanding the above decision by Judge Townsend, the Supreme Court of the State of Connecticut afterwards held the city of New Haven free from liability in a common law action for damages to a child from alleged improper construction of a drawbridge. The Court make a distinction between the bridge closed and open. They refer to "the movable part of the bridge, when it has, *in aid of navigation,* temporarily ceased to be part of such highway," and they distinguish the United States decision in the Westport case, on the special facts, and upon the ground that its decision was "upon *principles of maritime law,* that have no application here."

Daly *v.* New Haven, 69 Conn., 649.

If the mere swing of a drawbridge in aid of navigation submits it to the maritime law, and takes it out of the rule of the State decisions, how much more should the equipment of a powerful steam fireboat and sending her to navigate in ports

and harbors take it out of the narrow rule that denies any remedy for a collision with a hose cart on land?

Since the first argument of this case the point has been decided in the port of Chicago. The learned opinion of Judge Grosscup is printed in the Appendix.

March, 1899.

HARRINGTON PUTNAM
CHARLES C. BURLINGHAM
Advocates for Libellant.

Appendix.

THOMPSON NAVIGATION CO. v. CITY OF CHICAGO.

79 Federal Reporter, 984.

(District Court, N. D. Illinois. April 5, 1897.)

COLLISION—LIABILITY OF CITY FOR NEGLIGENCE OF ITS FIRE TUG.

A city is liable in personam for a collision between its fire tug and another vessel, caused by the negligence of the tug. The Fidelity Fed. Cas. No. 4,758, 16 Blatchf., 569, disapproved.

In Admiralty. Libel by the Thompson Navigation Company against the City of Chicago.

John C. Richberg, for libellant.
William G. Beale and B. Boyden, for defendant.

GROSSCUP, District Judge. This is a libel in personam against the city of Chicago, growing out of a collision between the fire tug Yo Semite, owned by that city, and the propeller City of Berlin, owned by the libellant. The collision occurred in the Chicago river, near the point where it branches into its south and north forks. At the time of the collision, the City of Berlin was lying in winter quarters. The circumstances of the collision were such that had the tug been owned by private owners, and engaged in a private enterprise, there could be no doubt of her liability for the injury done. In saying this, I keep fully in view the fact that fire tugs are expected by the nature of their duties to make haste. The haste in this case was blind and thoughtless, resulting in a delay to the tug, as well as injury to the City of Berlin. Indeed, counsel for the city do not seriously contest the fact of negligence. But the fire tug was at the time of the collision owned by the city of Chicago and actually engaged in one of the public duties that Chicago, as a part of the government, undertakes. Do these facts, or either of them, exempt her, or the city, responding in her behalf, from what would otherwise be her clear liability?

At common law, one injured either in his property or person looks for compensation to the person or persons causing the injury, or to the master or principals of such persons, where the injury was done within the scope of their agency or service. In admiralty the rule is this: The vessel committing the unlawful

injury is considered the offender, and the owner is mulcted to the extent of his interest in the vessel; not because he stands in the relation of principal or master to the crew, but alone because of the fact of ownership. Thus, under laws preventive of piracy or smuggling, the vessel may be seized, condemned, and sold, notwithstanding the crew committing the unlawful acts were engaged by the owner for a lawful enterprise only, and were, in the commission of the unlawful acts, wholly outside the scope of their engagement. U. S. v. The Malek Adhel, 2 How., 209. Commenting upon this apparent anomaly of maritime jurisprudence, and showing that the doctrines advanced in the case then under consideration were not different from those prevailing generally in maritime law, Mr. Justice Story, at page 234, speaks as follows:

"The ship is also, by the general maritime law, held responsible for the torts and misconduct of the master and crew thereof, whether arising from negligence or a willful disregard of duty; as, for example, in cases of collision and other wrongs done upon the high seas or elsewhere within the admiralty and maritime jurisdiction, upon the general policy of that law which looks to the instrument itself, used as the means of the mischief, as the best and surest pledge for the compensation and indemnity to the injured party."

It is thus apparent that the liability of the owner, to the extent of his vessel, for injuries caused in a collision by negligence or misconduct, is not dependent upon the relation of master and servant, or principal and agent, existing between him and the crew manning the vessel, but rests solely upon the fact of ownership. The ship, which, in contemplation of maritime law, is not the hulk and machinery only, but includes the crew as well, is, as such, the offender, and the ensuing losses reach the owner simply because of his relationship to the offender. In Rome, it is said that, when the owner of slaves was assassinated, every slave belonging to him, however otherwise innocent, was put to death. The penalty came not as the result of participation, but as the result of relationship. The maritime law, for justifiable public purposes, inverts this mandate, putting every owner, by virtue of such relation, to the duty of compensation for losses inflicted by his ship property, to the extent, at least, of the value of such property. Nor is this liability of the owner indirect alone, for the admiralty rules of the supreme court provide (rule 15) "that, in all suits for damage by collision, the libelant may proceed against either the ship and master, or against the owner alone in personam." The method of procedure chosen does not

change the substantive right or liability. In either case the ship is the offender. If the procedure be against the ship alone, resulting in seizure and sale, the owner is only indirectly reached; but, if it be against the owner in personam, the remedy against him is direct. The substantive right is compensation for the injury, and can be either by way of the ship or from the owner directly.

A firm grasp of this principle of maritime law clears this case of its difficulties. At common law the city is not liable for the negligent acts of its fire department, for the reason that the members of the fire department are not the servants of the city in its corporate capacity. The negligence of the firemen, therefore, is not attributable to the city. But in the case under consideration the injury done by the vessel, including its crew, to the libelant, is chargeable to the owner, by virtue of the mere fact of ownership, and can be collected, directly, by seizure of the vessel, or, indirectly, by a suit in personam. In either case the liability rests, not in the relation of principal and agent, or master and servant, but in the bare fact of ownership.

But, though such liability exists, reasons of public policy may, in some cases, exempt the owner from suit. The government, as sovereign, for instance, declines to be made compulsorily amenable to the courts upon even just obligations. This exemption, however, is founded entirely in public policy (The Siren, 7 Wall., 152), and ought not to be extended to cases where such considerations do not intervene. In England, I think, they do better. In claims arising against public vessels, the apparently conflicting right of the sovereign to exemption from suit, and her duty to respond to just claims, are both maintained by a procedure, effective, though somewhat fictitious. A petition of right is addressed by the aggrieved person to the lords in admiralty, representing the crown, who, in turn, direct their proctor to appear and answer a suit to be commenced in the admiralty court. This is equivalent to a waiver by the crown of its privilege as a sovereign, and to a consent that the rights of the parties be tried and determined in the suit as between subject and subject. There appears, however, to be no way of making the government of the United States, or of a state, parties to such a proceeding, because no procedure has been invented here whereby the right of immunity from the suit is waived. But the city of Chicago is, by law, amenable to suit and judgment upon all just claims that may be brought against it. The doctrine of public policy, therefore, under which this exemption is accorded

to sovereigns, stops short of city government. The law by making such cities suable abolishes the doctrine in what might otherwise be its application to city governments. The legislative will has, in effect, decreed that there is no public policy excepting cities from suit. The city is suable, and may be decreed to pay as a private owner where a case is proved. This clearly differentiates this case from the The Siren, supra.

One other consideration alone remains: I have held, on the strength of The Fidelity, 16 Blatchf., 569, Fed. Cas. No. 4,758, decided by Chief Justice Waite on the circuit, that an action in rem cannot lie against this fire boat. Will that prevent a decree in personam against its owner? The difference between mere procedure and substantive right must be steadily borne in mind. The latter alone determines the right of some judgment or redress. The former only fixes the method of reaching it. A seizure of the vessel is only a species of execution in advance of judgment. It is usually permissible in admiralty, because, under ordinary circumstances, most effective and equitable. But public policy prevents its application to such instrumentalities as a fire tug. A city cannot be left to burn while a contest over a few dollars of damage is going on. The law, therefore, out of considerations of public policy, forbids such seizure, or any process that would disarm the city, even temporarily, of its equipment to put down fires or like dangers. But exemption of the owner of the boat from one of the ordinary processes of the court is not, either in logic or law, a grant of immunity against liability, through some other procedure, not subject to such objections. The consideration of public policy extends only to the mischief to be averted. To give it a wider application would make it an instrument of injustice. An apt illustration of this limitation on procedure only is seen in the law which exempts cities, in the common-law court, from seizure of their property upon execution. But it has never been urged that, because of that, they were not suable at all, or that judgments entered against them were in no way enforceable.

My conclusion is that the city of Chicago, as owner, at the time of the collision, of the fire boat, is responsible to the libelant in an action in personam to the extent of the value of such fire boat for the injuries caused. I recognize that in this conclusion I depart from the case of the Fidelity, supra, but believe myself to be in consonance with the doctrine laid down in The Siren, supra, and The Malek Adhel, supra. A decree may be entered accordingly.

No. 1022. 0.8.

Brief of Dean for Appts. Con Der

Office Supreme Court U. S.
FILED.
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JAMES H. McKENNEY,
CLERK.

Filed May 20, 1895.

Supreme Court of the United States.

IN THE MATTER 1022

of

THE PETITION OF ROBERT W. WORKMAN, FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

Brief on behalf of the Respondent and Appellant, The Mayor, Aldermen and Commonalty of the City of New York, in Opposition.

FRANCIS M. SCOTT,
Counsel to the Corporation,
Proctor for the Respondent and Appellant,
THE MAYOR, ALDERMEN AND COMMONALTY OF THE CITY OF NEW YORK.

DAVID J. DEAN,
THEODORE CONNOLY,
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Advocates.

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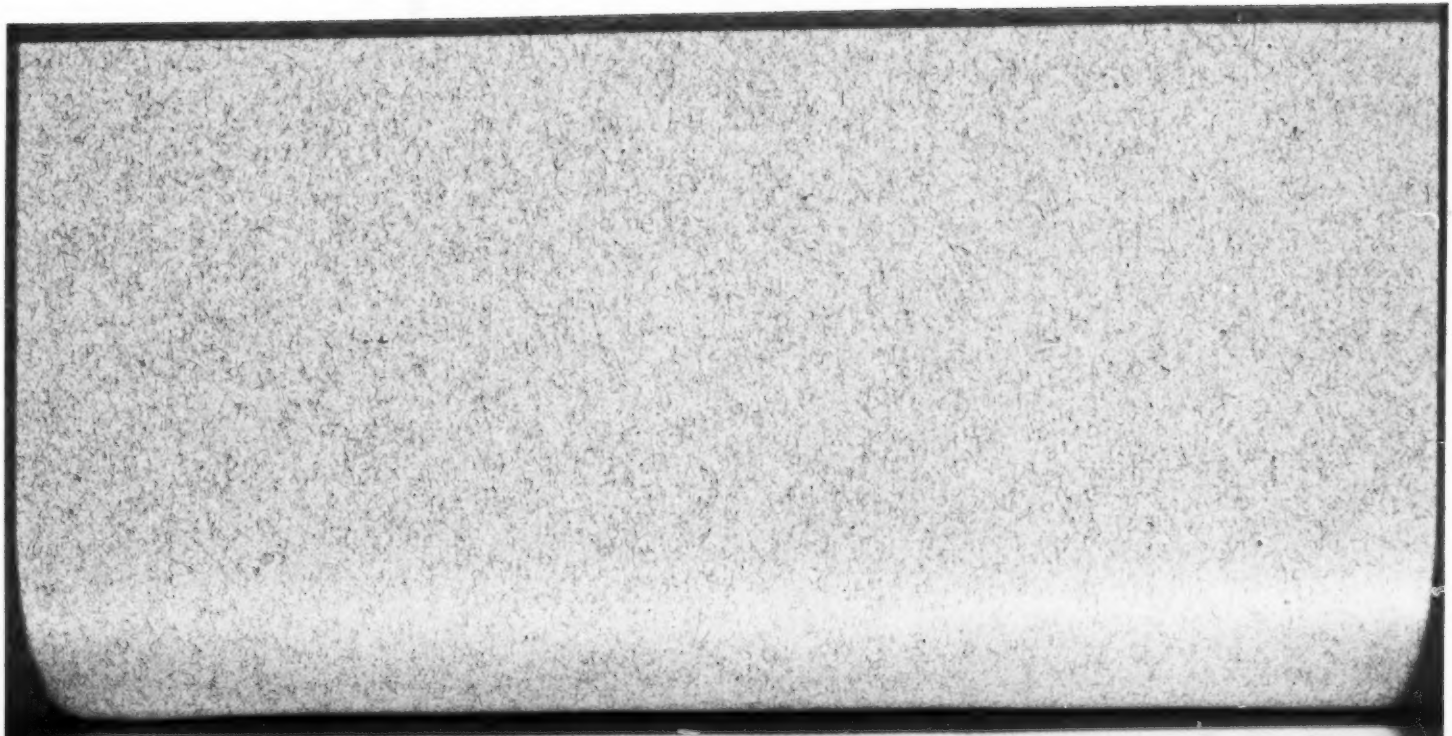

Supreme Court of the United States.

IN THE MATTER

of

The Petition of ROBERT W. WORKMAN for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit.

Brief on behalf of the respondent and appellant, The Mayor, Aldermen and Commonalty of the City of New York, in opposition to the petition of Robert W. Workman for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit.

The petition filed in this proceeding having been served upon the Counsel to the Corporation late in the afternoon of Wednesday, May 15, the Counsel to the Corporation is compelled to ask permission of the Court to attach and file as part of this brief in opposition to the petition, as Schedules A and B, the briefs argued on behalf of the respondent and appellant, the Mayor, Aldermen and Commonalty of the City of New York,

in the United States Circuit Court of Appeals for the Second Circuit.

The attention of the Court is respectfully called, however, to certain propositions which, not being under discussion in the Circuit Court of Appeals, were not argued upon the briefs in that Court.

In the act "to establish circuit courts of appeals and to define and regulate in certain cases the jurisdiction of the courts of the United States, and for other purposes," by section 6 of that act, the judgment of the Circuit Court of Appeals in all cases arising out of admiralty cases is made final, with the proviso that in every subject within the appellate jurisdiction of the Circuit Court of Appeals, upon which the judgment of that Court is, by the terms of the act, made final, that Court *may* certify to the Supreme Court of the United States, any question or proposition of law *concerning which it desires the instruction of that Court*, for its proper decision.

We assume that the Supreme Court will not, where the Circuit Court of Appeals has not only declined to certify *any* question or proposition of law involved in this cause, as a question or proposition, upon which it desires instruction, but in the unanimous opinion of the Court declares the fact to be (see Record, p. 132, fol. 528).

> "*We entertain no doubt* that the City was not li-
> "able for the negligent management of the fire-
> "boat in the present case."

direct that the proceeedings be certioraried, that a doubt not existing in the mind of the Judges of the Circuit Court of Appeals, may be litigated in this Court for the gratification of the libellant.

Of the propositions of law requested to be certified by the United States Circuit Court of Appeals to this

Court, the propositions numbered 1, 2, 3, 4 and 5 are fully discussed in the brief and argued on the hearing of the appeal in the Circuit Court of Appeals, to which we beg leave to refer the Court.

The proposition requested to be certified at page 5, and numbered 6, the Court will observe is not a question properly reviewable by certiorari, since no such contention was made either in the District Court, or in the Circuit Court of Appeals, and is a proposition that does not properly arise upon the record.

The State of New York, of course, has never exempted the municipal owner of a steam vessel from the liabilities imposed on other vessels. Such exemption as exists, exists by operation of law, and is an exemption conferred by the Courts in a long line of decisions, and not by any legislative exercise of power.

We respectfully submit that the question submitted at page 6 of the petition under number 4. that in this controversy a question of constitutional law is involved, ought not to be made the subject or basis of a certiorari to this Court for three reasons :

1st. Because that question does not arise properly upon the record.

2d. Because, as will appear by the record, it was not argued as a proposition of law in the Court below.

3d. Because the only way in which a question of constitutional law could arise would be where the jurisdiction of the United States courts to pass upon the merits of a controversy within the admiralty jurisdiction of the courts of the United States was raised.

We are well aware that the question of the granting of a writ of certiorari is always within the discretion of this honorable court, but we assume that unless con-

clusions reached by an appellate court, constituted with an appellate jurisdiction designed finally to decide and determine certain questions, are clearly questionable, a writ of certiorari will not be granted.

All of which is respectfully submitted.

FRANCIS M. SCOTT,
Counsel to the Corporation,
Proctor for the respondent and appellant, The Mayor, Aldermen and Commonalty of the City of New York.

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(5440)

[REG. 44, FOL. 448.]

Schedule A.

United States Court of Appeals

FOR THE SECOND CIRCUIT.

ROBERT W. WORKMAN,
Libelant and Appellee,

vs.

THE MAYOR, ALDERMEN AND COMMONALTY OF THE CITY OF NEW-YORK, and JAMES A. GALLAGHER,
Respondents and Appellants,

(Impleaded with the Fire Department of the City of New York).

Brief and Points for Respondents and Appellants.

STATEMENT.

This is an appeal by the respondents and appellants from a decree of the District Court awarding the libelant and appellee the sum of $815.84 as damages, interest and costs, against the Mayor, Aldermen and Commonalty of the City of New York and against

James A. Gallagher, pilot of the fire-boat "New Yorker."

On Sunday the 11th day of June, 1893, the barkentine "Linda Park" was lying on the easterly side of Pier 48, East river, and moored a sufficient distance in toward the bulkhead, with her bow pointing toward the river, to allow of a schooner's being moored to the same pier with *her* bow *in* toward the bulkhead, allowing a space of some 6 feet between the ends of the respective bowsprits (see Case, p. 9, fols. 35–38; p. 37, p. 38, fol. 149), and alongside of the barkentine "Linda Park" lay a barge with a beam of from 30 to 35 feet (see Case, p. 38, fol. 152). On the opposite pier and on the westerly side of Pier 49 was a covered railroad barge with a beam of some 40 feet (see Case, p. 39, fol. 153).

By reference to a diagram in the case, the respective dimensions of the piers and bulkhead and the extent of the open water between Piers 48 and 49 will appear as follows: The width of the bulkhead between the piers is shown to be 129 feet, and 54 inches; the length of Pier 48 is shown to be 329 feet and 58 inches; and the length of Pier 49, 324 feet and 99 inches; and the clear water between the piers at the extreme ends upon the river front, 126 feet and 42 inches.

Allowing for the closing of the clear water between the extreme ends of Piers 48 and 49, by the width of the barge at 40 feet, lying practically at the end of Pier 49, alongside the pier, and the width of the schooner lying practically at the extreme end of Pier 48 at 30 feet, the 126 feet and 42 inches of clear water is reduced by 70 feet, leaving 56 feet and 42 inches of clear water between Piers 48 and 49.

Some time between 3 and 4 o'clock Sunday afternoon, June 11, a fire broke out at the corner or Clinton street, and both the fire-boats "New Yorker" and "Havemeyer" were summoned by telegraph to the scene. At

the time the tide was running strong flood and the "Havemeyer" (known as Engine Company No. 43) coming down the East river and against the tide, from her station at the foot of Grand street, running in between Piers 48 and 49, made fast to the proper place at the bulkhead, and commenced to play upon the fire (see Case, pp. 54 and 55, fols. 213–220).

The "New Yorker," a larger and heavier boat, summoned from her station, Pier 1, North river, coming up with the tide and attempting to enter the slip, was caught by the eddy between the piers and swept against the "Linda Park." At the time the "New Yorker" reached the slip, according to the testimony of the libelant's witnesses, the fire had been under way some 20 or 30 minutes and was then blazing (see Case, p. 53, fol. 210).

For the injury done to the barkentine, on the 27th day of July, 1893, a libel was filed against the Mayor, Aldermen, and Commonalty of the City of New York as sole respondents. On the 8th day of August, 1893, an answer was interposed by the Mayor, Aldermen and Commonalty, defending both upon the merits and upon the law, upon the ground that they were not responsible for any acts of negligence committed by the servants and employees of the Fire Department (see Case, pp. 3–11).

This case having been on the calendar of the District Court for a number of days and answered, "ready," the respondents, the Mayor, Aldermen and Commonalty of the City of New York, on the 9th day of November, 1893, were ordered to show cause why the libel should not be amended by making the Board of Fire Commissioners of the City of New York, and the Captain of the fireboat "New Yorker," parties defendant therein (Case, fol. 12).

The motion to amend the libel coming on to be heard before the District Judge on November 10, 1893, the

District Judge allowed the amendment prayed for and allowed the respondent to bring in both the Fire Department and the defendant, Gallagher, but upon the ground that

> " The authorities cited in the defendants' brief
> " make it apparently very doubtful whether the
> " libellant can recover against the City for the
> " faults of the Fire Department, however clear the
> " fault of the 'New Yorker' may be " (see Case,
> " page 15).

Upon the order entered upon that decision of December 1, an amended libel was filed against the Mayor, Aldermen and Commonalty of the City of New York, against the Fire Department of the City of New York and James A. Gallagher, the pilot (see Case, p. 17).

On the 12th, the defendant, Gallagher, filed his answer defending upon the merits (see Case, pp. 21 to 27). The respondent, the Fire Department, excepted to the libel for want of sufficiency, in that the amended libel failed to allege in what capacity the Fire Department of the City of New York was sued, and failed also to allege whether the Fire Department of the City of New York was a corporation, foreign or domestic, and because also there was no negligence charged in the amended libel against the Fire Department (see Case, p. 28).

These exceptions coming on to be heard on the 27th day of December, 1893, the District Court entered an order sustaining certain of the exceptions as therein recited (see Case, p. 29), and thereafter an amendment to the amended libel was filed (see Case, p. 31) and thereafter the Fire Department answered (see Case, pp. 32 to 35), and the questions involved were at issue between all the parties of the record.

The case came on to be heard before the Judge of the District Court on the 9th day of April (see Case, p. 36), and thereafter the District Court decreed that

the libel be dismissed as against the Fire Department of the City of New York, but rendered a decree against both the Mayor, Aldermen and Commonalty of the City of New York and against James A Gallagher, the pilot, which is the decree now appealed from.

POINTS.

I.

The Mayor, Aldermen and Commonalty of the City of New York are not liable to an action for damages on account of the negligence of the officers or employees appointed or employed by the Commissioners of the Fire Department in the performance of their public duties.

This exemption from liability springs from the nature of the duty performed by the officers and members of the Fire Department.

The extinguishment of fires is undertaken as a public or governmental duty, imposed for the public or general benefit, and from which the Corporation derives no corporate benefit or emolument.

The distinction between the powers and duties of municipal corporations from which corporate emolument is derived and those functions which are purely governmental, performed for the public good, from which no benefit or revenue comes to the Corporation, is made the test of liability for the consequence of neglect on the part of the agents necessarily employed by the Corporation.

In Dillon on Municipal Corporations, vol. 1, p. 107, 4th ed., it is said, concerning municipal corporations, that they "possess a double character; the one gov-

"ernmental, legislative, or public; the other in a sense "proprietary or private.

"The distinction between these, though sometimes "difficult to trace, is highly important and is frequently "referred to, particularly in the cases relating to the "implied or common-law liability of municipal cor- "porations for the negligence of their servants, agents, "or officers in the execution of corporate duties and "powers."

Dillon on Municipal Corporations, 4th ed., vol. 2, page 1180, section 966, further says that municipal corporations are "considered to be impliedly liable (un- "less the legislation negatives such liability) for wrong- "ful acts done in what is termed their private or cor- "porate character from which they derive some special "or immediate advantage or emolument, but not as to "such acts done in their public capacity as governing "agencies in the discharge of duties imposed for the "public or general (not corporate) benefit."

The following cases are cited in support of the doctrine thus defined:

Oliver *vs.* Worcester, 102 Mass., 489.
Richmond *vs.* Long's Adm., 17 Gratt., 375.
Petersburgh *vs.* Applegarth, 28 Gratt., 321.
Western Savings Fund Society *vs.* Philadelphia, 31 Pa. St., 175, 189.
Bailey *vs.* The Mayor, 3 Hill, 531.
Maximilian *vs.* The Mayor, 62 N. Y., 160.

The following is quoted from Oliver *vs.* Worcester, 102 Mass., 489:

"The distinction is well established between the "responsibilities of towns and cities for acts done "in their public capacity in the discharge of duties "imposed on them by the Legislature for the pub- "lic benefit, and for acts done in what may be "called their private character, in the management "of property and rights voluntarily held by them "for their own profit and advantage as a corpora-

"tion, although inuring ultimately to the benefit "of the public."

In Bailey *vs.* The Mayor, 3 Hill, 531, the distinction between the public and private capacity of municipal corporations is maintained by Chief Justice Nelson. He says, in relation to municipal powers:

"If granted for public purposes exclusively they "belong to the corporate body in its public politi- "cal or municipal character. But if the grant was "for the purposes of private advantage and emolu- "ment, though the public may derive a common "benefit therefrom, the corporation, *quoad hoc*, is to "be regarded as a private company."

And from such considerations the question of liability in the case was determined.

In the same case, 2d Denio, 433, the same distinction between governmental duties exercised for public benefit, and the duties through which the corporation derives benefit for itself is maintained, and the exemption contended for in the case at bar recognized, as follows:

"On the other hand, where such corporation is "bound to appoint an officer for the performance "of a public duty it is not liable" (p. 446).

In Maximilian *vs.* The Mayor, 62 N. Y. Rep., the Court of Appeals say:

"There are two kinds of duties which are im- "posed upon a municipal corporation: one is of "that kind which arises from the grant of a "special power, in the exercise of which the "municipality is as a legal individual; the other "is of that kind which arises, or is implied, from "the use of political rights under the general law, "in the exercise of which it is as a sovereign. The "former power is private, and is used for private "purposes; the latter is public and is used for

" public purposes (Lloyd *vs.* The Mayor, 5 N. Y.,
" 374). The former is not held by the munici-
" pality as one of the political divisions of the
" State; the latter is. In the exercise of the for-
" mer power, and under the duty to the public
" which the acceptance and use of the power in-
" volves, a municipality is like a private corpora-
" tion, and is liable for a failure to use its power
" well, or for an injury caused by using it badly.
" But where the power is intrusted to it as one of
" the political divisions of the State, and is con-
" ferred, not for the *immediate* benefit of the mu-
" nicipality, but as a means to the exercise of the
" sovereign power for the benefit of all citizens, the
" corporation is not liable for nonuser, nor for mis-
" user by the public agents (Eastman *vs.* Meredith,
" 35 N. H., 284).

" Where the duties which are imposed upon
" municipalities are of the latter class, they are
" generally to be performed by officers who, though
" deriving their appointment from the corporation
" itself, through the nomination of some of its
" executive agents, by a power devolved thereon
" as a convenient mode of exercising a function of
" government, are yet the officers, and hence the
" servants, of the public at large. They have
" powers and perform duties for the benefit of all
" the citizens, and are not under the control of the
" municipality, which has no benefit, in its cor-
" porate capacity, from the performance thereof.
" They are not then the agents or servants of the
" municipal corporation, but are public officers,
" agents or servants of the public at large,
" and the corporation is not responsible
" for their acts or omissions, nor for
" the acts or omissions of the subordinates by them
" appointed (Fisher *vs.* Boston, 104 Mass., 87).
" And where a municipal corporation elects or ap-
" points an officer, in obedience to an act of the

"legislature, to perform a public service, in which "the corporation has no private interest, and from "which it derives no special benefit or advantage "in its corporate capacity, such officer cannot be "regarded as a servant or agent of the municipality, "*for whose negligence or want of skill it can be held* "*liable.*

"It has appointed or elected him, in pursuance "of a duty laid upon it by law, for the general "welfare of the inhabitants or of the community."

In the same case the Court further says:

"Where it (the City) authorizes a use of its cor- "porate property, which use itself makes that "property harmful to others, it is liable. Such is "understood to be one of the grounds on which "went Bailey *vs.* The Mayor (2 Denio, 433). And "the duty of keeping in repair streets, bridges, and "other common ways of passage, and sewers, and "a liability for a neglect to perform that duty rests "upon an express or implied acceptance of the "power and an agreement so to do. It is a duty "with which the City is charged for its own cor- "porate benefit, to be performed by its own agents, "as its own corporate act (Conrad *vs.* Trustees of "Ithaca, 16 N. Y., 158). It is not always easy to "say within which class a particular case should "be placed. But when it is determined that the "power and duty are given and taken for the ben- "efit of the corporation as a corporate body, "and the act to be done is to be done by "it through agents of its appointment and under "its control and power of removal, there is no "doubt of its liability for negligent omission or "negligent attempt at performance. When the "powers created and duly enjoined are given, and "laid upon officers to be named by the corporation, "but for the public benefit and as a convenient "method of exercising a function of general gov-

"ernment, and the corporation has no immediate
"control nor immediate power of removal of those
"officers, nor of their subordinates and servants,
"then it is not liable for their negligent omission
"or action."

The doctrine of Maximilian *vs.* The Mayor has been repeatedly reaffirmed and enforced by the Court of Appeals of the State of New York in subsequent cases.

In Bieling *vs.* The City of Brooklyn, 120 N. Y., Rep., p. 98, where there was a recovery for damages sustained in consequence of the fall of a wooden awning in a street of the City, the Court says:

"The municipality can perform its functions
"only through officers or agencies. For the dis-
"charge of those powers of a governmental or
"political character, which are vested by the
"statute in officers, and those duties not placed
"upon it but upon officers or departments created
"and vested with powers for public purposes, as
"distinguished from those for the purposes of the
"corporation, it is not responsible for their
"misconduct or neglect, to individuals suffering
"damages as the result of it (Lloyd *vs.* Mayor,
"etc., 5 N. Y., 374; Maximilian *vs.* Mayor, etc., 62
"id., 160; Ham *vs.* Mayor, etc., 70 id., 459; Smith
"*vs.* City of Rochester, 76 id., 506.)

"There are various duties which are legitimately
"those of the corporation, amongst which is that
"of taking care of the streets within it. To keep
"them in safe condition for public use was a
"primary duty resting upon the City of Brooklyn."

The same principle has been adjudicated in other States.

In Mead *vs.* New Haven, 40 Conn., 72, where a City, under power given by its charter, appointed an in-

spector of steam boilers within the City, and by by-law imposed a penalty on any person who should use such a boiler without having it tested by the inspector, it was held that the City was not liable for negligence of the inspector in the discharge of his duty.

The Court says :

"The duty of inspection of boilers is governmental. The object of the inspection is to protect all citizens from danger, who may come in contact with the boiler, or may be exposed in any way to danger from its unsafe condition. The City, as such, has no pecuniary or individual or private interest in the matter, and although the power of the City over the subject is conferred by the charter, and not by the general law, yet the City must, we think, be regarded as the agent of the government, and, acting for the State, and not for itself, in making the appointment of inspectors, and therefore not liable for the inspector's negligence."

See also—

Brown *vs.* Vinalhaven, 65 Maine, 402.
Mitchell *vs.* Rockland, 52 Maine, 118.

II.

This exemption from liability growing out of the nature of the duties performed is recognized and enforced, even when the duties are defined, and the executive officers created to perform the same by provisions in the charter, or organic act creating the municipal corporation, as well

as when the duties are imposed upon corporate officers by independent statutes.

In Maxmilian *vs.* Mayor, the servant by whose negligence the plaintiff was injured, was appointed by the Commissioners of Charities and Correction, corporate officers, to whom was intrusted the execution of the laws in relation to the relief of the poor sustained in the almshouses and hospitals, and in relation to criminals in custody in the public prisons.

Such Commissioners were, in the first instance, invested with power by an independent act, chapter 510 of the Laws of 1860, p. 1026.

At the time of the occurrence by which the plaintiff was injured, the Commissioners of Charities and Corrections had become a department of the City Government, under and pursuant to section 80, chapter 137 of the Laws of 1870, the City Charter, provided for, as such department, by specific provisions in the Charter of the City, authorized to exercise all the powers and duties defined by the Act of 1860.

The Court notices the creation of the Commissioners by the Act of 1860 and subsequent transformation into a department of the City Government, as follows:

> " By this act (the Act of 1860) that department
> " is created in the City and County of New York,
> " and it is declared that there shall be chief officers
> " thereof, and their name of office is designated
> " (sec. 1). They thereby have their appointment
> " from the Comptroller of the City and County,
> " though since then they are made a department of
> " the City and appointable by the Mayor (Laws of
> " 1870, chap. 137, p. 366, sections 29–30; p. 386,
> " sec. 80).

The Court further say:

> " The Commissioners of Charities and Correc-
> " tion are public officers, though getting their right
> " of office from a circumscribed locality; and the

"acts which they may do are to be done in their "capacity as public officers, in the discharge of "duties laid upon them by the law for the public "benefit, and far removed from acts done by city "or town, in its municipal character, in the man- "agement of its property for its own profit or "advantage. It is seen at once that the powers "and duties of the Commissioners of Charities and "Correction are not to be exercised and performed "for the especial benefit of the defendant, (the City "of New York). It gets no emolument therefrom, "nor any good as a corporation. It is the public, "or individuals as members of the community, "who are interested in the due exercise of these "powers and the proper performance of their "duties."

The analogy between the duties of the Commissioners of Charities and Correction and of the Fire Commissioners, as to the public, governmental character thereof, is complete; and the Fire Department, although an executive department of the City Government, still performs duties which pertain not to the emolument of the Corporation or its special benefit, and which pertain only to the public good and the performance of a public duty.

The Fire Department originated also by a system of laws similar to the laws by which the Department of Charities and Correction was created.

Prior to 1865 the extinguishment of fires was undertaken by volunteer associations, to which the municipality furnished apparatus, and by ordinances regulated, in some respects, the government thereof.

For the acts or negligence of such associations, their officers or members, when engaged in extinguishing fires, the Courts held that the Corporation was not liable.

O'Meara *vs.* The Mayor, 1 Daly, 425.

By chapter 249 of the Laws of 1865, page 395, the Metropolitan Fire District was established; the appointment of Commissioners provided for; an elaborate provision made for the government and discipline of the officers and members thereof; the duties defined, and provision made for the payment to the officers and members for service performed.

Subsequently by section 30, chapter 137, Laws of 1870, being the City Charter, a Fire Department was created in the City Government, and by section 1 of the same act, as amended by section 16 of chapter 574, Laws of 1871, the Municipal Fire Department was constituted, consisting of a board of five persons authorized to perform all the duties prescribed by the Act of 1865, in relation to the extinguishment of fires.

The Fire Department thus became a charter department, empowered and authorized to execute the State law in respect to a duty in which the City has no pecuniary or private interest, and in which the department is still to be regarded as the agent of the State Government, acting for the State in executing governmental power for the public and not for the corporate benefit.

The educational establishment of the City is another instance of a department created within the City Government, authorized to discharge duties not local or corporate, but related to and belonging to the administration of the State Government; which, although formally a department of the Municipal Government, is still, by the decision of the Court of Appeals, recognized as an administrative branch of the State Government, for which the City is not liable in damages in respect to negligence of an employee of the department.

Ham *vs.* The Mayor, 70 N. Y. Rep., 459.

It therefore may be considered to be the established doctrine, that if the nature of the duty performed is

governmental, and not corporate, the City is exempt from liability for the negligence of an officer, agent, or servant appointed by it to execute such duty, even when the duty is cast upon a department or officer of the municipality, by specific provisions in the corporate charter.

III.

The duties of a fire department are governmental and not corporate, and consequently of the class upon which corporate liability for the negligence of the officers or servants employed therein cannot be predicated.

It is said in Dillon on Municipal Corporations, above quoted, that the distinction between corporate and governmental duties is well established, though difficult to trace. It is therefore proper to refer to the concrete cases in which the Courts have defined the distinction.

(*a*) It is well settled that the caring for public streets, keeping them in order for safe and convenient use, regulating, grading and paving them, is deemed to be a duty assumed by the corporation, in consideration of the privileges granted by its charter, performed for its corporate advantage, and therefore that liability in damages is cast upon the corporation, in case of negligence on the part of its officers, agents or servants in respect to the performance of such duties.

Maximilian *vs.* The Mayor, *supra.*
Bieling *vs.* City of Brooklyn, 120 N. Y. Rep., 106.
Ehrgott *vs.* The Mayor, 96 N. Y.
Rehberg *vs.* The Mayor, 91 N. Y. Rep., 144.
Hume *vs.* The Mayor, 74 N. Y. Rep., 264.

The duties performed by the Commissioners of Charities and Correction in support of the poor, and the confinement of prisoners under criminal charges, and the performance of duties connected with the maintenance of the school system have been distinctly defined by the Court, as falling within the class of governmental duties performed for the public and not corporate benefit, and no liability for negligence on the part of the officers, agents or servants employed therein is imputed.

Maximilian *vs.* The Mayor, 62 N. Y. Rep., 162.
Ham *vs.* The Mayor, 70 N. Y. Rep., 459.

In respect to the extinguishment of fires, the decisions of the Courts in all the States agree in including that duty among the governmental functions performed by municipal corporations in behalf of the public, as to which the corporation is exempt from liability in damages for neglect of the officers, agents or servants employed therein.

In the American and English Encyclopædia of Law, volume 7, page 997, it is said :

> " The members of the fire department of a
> " municipality are public officers, and not the mere
> " servants of the municipality ; and, in the absence
> " of an express statute, the municipal corporation
> " is not liable for injuries occasioned by the negli-
> " gence of the members of its fire department in
> " performing their duties."

And this doctrine is supported by numerous cases cited.

The text books are emphatic and clear on the subject, and maintain the same doctrine.

Judge Dillon's well-known work has already been referred to.

In the latest book on the subject it is said:

> "Municipal corporations are not liable for the "negligence of their firemen—although they may "be appointed and removed by the city, and the "performance of duties are wholly subject to its "control."
>
> Tiedeman on Municipal Corporations. sec. 333*a*.

And another very recent work also says:

> "Members of a fire department, as officers "charged with a public service, are not the agents "or servants of the city which appoints them, and "the city is therefore not liable for their negligent "discharge of official duty, nor is it liable for "negligence in the performance of a public duty "imposed by law" upon its members.
>
> 1 Beach on Public Corporations, sec. 744.

And see also

> Jones on Negligence of Municipal Corporations, section 31.

After a careful search of the authorities, and after throwing aside a great number of decisions which relate to failure to supply water, and which, although bearing upon the question, are not absolutely in point, the following authorities will be found to sustain, without exception and under the varying circumstances therein discussed, the doctrine of the non-liability of a municipal corporation for the acts of its fire department.

And the attention of the Court is most earnestly called to the fact already pointed out, that in the decisions no distinction whatever is drawn between fire departments organized by a distinct and separate law of the State, and fire departments which are organized under a city charter, or which by the wording of the

statutes creating them, form an integral part of the administration of the City Government, although not specifically named in the City Charter.

The following are the principal cases, with a short memorandum of the facts under which they arose:

Hafford *vs.* New Bedford, 16 Gray, 297 (hose-carriage on way to fire running over person).

Fisher *vs.* Boston, 104 Mass., 87 (injuries from bursting hose).

Burrill *vs.* Augusta, 78 Me., 118 (frightening horse by escaping steam from engine left in street).

Wild *vs.* Patterson, 47 N. J. Law, 406 (injury arising from defect in brake of engine).

Hayes *vs.* Oshkosh, 33 Wis., 314 (fire caused by negligent management of engine, allowing escape of sparks, etc).

Kies *vs.* Erie City, 135 Pa. St., 144 (negligent arrangement of engine-house doors).

Wilcox *vs.* City of Chicago, 107 Ill., 334 (collision with hook-and-ladder wagon).

Edgerly *vs.* Concord, 59 N. H., 78 (negligent testing of hydrant).

Howard *vs.* San Francisco, 51 Cal., 52 (collision with engine).

McKenna *vs.* St. Louis, 6 Mo. App., 320 (negligent running of hose-carriage).

Jewett *vs.* New Haven, 38 Conn., 368 (negligent driving of hose-carriage).

Heller *vs.* Sedalia, 53 Mo., 159 (want of proper exertions to extinguish fire).

Grube *vs.* St. Paul, 34 Minn., 402 (careless driving of hose-carriage).

Wheeler *vs.* Cincinnati, 19 Ohio St., 19 (insufficient water and insufficient efforts to extinguish fire).

Brinkmeyer *vs.* Evansville, 29 Ind., 187 (insufficient water and engines out of repair).

Robinson *vs.* Evansville, 87 Ind., 334 (hose insufficient in length to reach fire).

Welsh *vs.* Rutland, 56 Vt., 228 (slipping on ice arising from water escaping from a fire-hydrant).

Greenwood *vs.* Louisville, 13 Bush, 226 Ky., (engine negligently running over person on sidewalk).

Freeman *vs.* Philadelphia, 7 W. N. C., Pa., 45 (injuries from careless driving of engine).

Knight *vs.* Philadelphia, 15 W. N. C., Pa., 307 (injuries from careless driving of fire-engine).

Dodge *vs.* Granger, 17 R I., 664; 24 Atl. Rep., 100 (negligent projection of ladder from engine-house).

Lawson *vs.* City of Seattle, 6 Wash., 184; 33 Pac. Rep., 347 (defective brace).

Gillespie *vs.* City of Lincoln, 35 Neb., 34; 52 N. W. Rep., 811 (killing by ladder-wagon).

Simon *vs.* Atlanta, 67 Ga., 618 (collision with rope stretched across street by municipality to allow parade of fire department).

In Hafford *vs.* New Bedford, 16 Gray, 297, already cited, it is said:

"The members of the Fire Department of New "Bedford, when acting in the discharge of their "duties, are not servants or agents in the employ- "ment of the city, for whose conduct the city can "be held liable; but they act rather as officers of "the City, charged with the performance of a cer-

" tain public duty or service, and no action will
" lie against the city for their negligence or im-
" proper conduct while acting in the discharge of
" their official duty."

In this case the members of the Fire Department were acting under a law which had been accepted by a popular vote of the citizens, and made a part of the organic law of the City, and the officers and members were paid from the City treasury for their services.

In Fisher *vs.* Boston, 104 Mass., 87, the city was held not to be liable for a personal injury to the plaintiff caused by the bursting of a hose attached to a fire-engine.

The Court say :

" It makes no difference whether the Legislature
" itself prescribes the duties of the officers
" charged with the repair and management of fire-
" engines, or delegates to the city or town, the
" definition of those duties by ordinance or by-
" law. However appointed or elected, such per-
" sons are public officers, who perform duties im-
" posed by the law for the benefit of all the
" citizens, the performance of which the city or
" town has no control over, and derives no benefit
" from, in its corporate capacity. The acts of such
" public officers are their own official acts, and not
" the acts of the municipal corporation or its
" agents."

In Jewett *vs.* New Haven, where the plaintiff was negligently run into and injured by the driver of a hose-cart, a member of the Fire Department, who was hastening to the engine-house to procure additional hose for use at a fire ; held, that the members of the Fire Department, when engaged in extinguishing fires, are performing a public, governmental act for the general good, and cannot be regarded as servants of the City, for whose negligence it can be held liable.

The Fire Department in this case was a paid fire department, organized under a law accepted by a popular vote of the citizens of the city, and made a part of the organic law of the municipality.

The quotation from the opinion of Chief Justice Butler, inserted by the learned Trial Judge in his opinion in the case at bar, is a quotation from a dissenting opinion, and while doubtless quoted by the Court Justice below as well expounding Judge Butler's views, yet defines the doctrine which was condemned by the decision in the case.

In Knight *vs.* Philadelphia, 15 W. N. C. (Pa.), 307, the Court says:

> "The members of the Fire Department are not "such servants of the Municipal Corporation as "to make it liable for their acts of negligence. "Their duties are of a public character and for a "high order of public benefit. The fact that the "act of Assembly did not make it obligatory on "the City to organize a Fire Department, does not "change the legal liability of the municipality for "the conduct of the members of the organization. "The same reason which exempts the City from "liability for the acts of its policemen applies "with equal force to the acts of its firemen."

In O'Meara *vs.* The Mayor, 1 Daly, 425, the Court says:

> "The powers exercised by the defendants in re- "ference to the Fire Department, are conferred "and employed exclusively for the public benefit, "not for purposes of private advantage and emolu- "ment, and this is an answer to the plaintiff's "claim."

The definition of the Court in relation to the nature of the powers exercised by those who extinguish fires as officers of the Fire Department, is equally applic-

able to the department, organized under the present laws, as it was to the volunteer department, which was organized, sustained, and supplied by the City, at the time when the last mentioned case was decided.

IV.

The contention of the defendants in this case does not controvert the doctrine laid down in Barnes vs. The City of Columbia, 91 U. S. Rep., 530.

The action in that case was brought to recover for damages sustained by the plaintiff in consequence of falling into an excavation in the street, negligently left there by the Commissioners authorized to improve the streets.

The duty performed by the Commissioners, in behalf of the municipality, was the duty of caring for streets, which, in all the cases in this State, and all other States, is held to be a duty performed for the corporate benefit, as to which a liability in damages arises, if the officers charged with executive powers in respect thereto are negligent in the performance of their duty.

The duty which was performed by the Commissioners was a corporate duty, distinguishable from the governmental duty of extinguishing fires, which is performed for the public, and not for the corporate advantage and benefit.

Defendants argue, therefore, that the foregoing authorities and the principles thereby illustrated sustains the following proposition:

1st. That the municipal corporation, through the Fire Department, exercises powers which are purely

governmental, for the public benefit; from which it derives no revenue or emolument as a corporation; therefore, that it is not liable for the consequence of the neglect of an agent necessarily employed by it, in the absence of express statute creating such liability.

The position of the defendants in relation to the performance of the duty of extinguishing fires, and its relation to the public, is closely illustrated by the case of Murphy *vs.* The Commissioners of Emigration, 28 N. Y. Rep., 142.

The Commissioners of Emigration were public governmental agents, exercising their powers for the public good and not for their individual advantage or emolument.

They were sued for the value of property lost by the neglect of their agents.

It was argued in their defence that they were representatives of the government transacting public business through agents; that the government, and consequently the Commissioners, is not liable for the neglect of the agents if necessarily employed in transacting public business.

Citing—

Story on Agency, sec. 319.
Story on Bailment, sec. 462.
Seymour *vs.* Van Slyck, 8 Wendell, 403 422.
United States *vs.* Kirkpatrick, 9 Wheaton, 735.
Whitfield *vs.* Lord de Spencer, Cowp., 342.

The Court says:

"The position of the defendants is distinguish-
"able from that of persons acting for their own
"benefit or employing others for their own benefit.
"They do not act for their own benefit or employ
"agents, clerks or servants for their own benefit,
"but for the benefit of the community at large."

Story on Agency, section 319, says:

> "The doctrine is now firmly established that "public officers and agents are not responsible for "the misfeasances or positive wrongs, or for the "nonfeasance or negligences of the servants and "other persons properly employed by and under "them, in the discharge of their special duties."

Upon the same principle, an action does not lie against the Postmaster-General for property lost in course of transmission through the mail.

Whitfield *vs.* Lord De Spencer, Cowp., 342.

The controversy in the case at bar is altogether similar to the contention that the City is liable for the negligence or neglect of policemen employed by it in the preservation of the public peace.

That such liability does not exist is well settled.

McKay *vs.* City of Buffalo, 9 Hun, 401; affirmed 74 N. Y. Rep., 619.

Nor is a City liable for the acts of its Board of Health.

Bamber *vs.* City of Rochester, 26 Hun, 587.

The doctrine of exemption from liability of municipal corporations for the neglect of police officers is now fixed beyond controversy; the similarity in the nature of the duty performed by policemen and by firemen is obvious; and that both perform governmental functions is obvious; and the principle which exempts the municipal corporation by which both policemen and firemen are appointed or employed, is equally applicable as to both policemen and firemen.

V.

The law, as laid down by the Courts of the State of New York, is positive and clear.

As has already been suggested hereinbefore, the decisions of the various States cited draw no distinction between liability for the acts of a fire department organized under a city charter, and fire departments organized under separate and special acts, but performing their functions within a specific area.

This is important in view of the evident stress laid by the learned Judge below upon the supposed distinction in the decisions of the State of New York between the powers of the New York City Fire Department as organized prior to, and as existing after the department became by statute a part of the administration of the City government.

The first case in this State has been already mentioned—O'Meara *vs.* The Mayor, 1 Daly, 425.

That case was decided under the law relating to the old fire department, and was before the union of the City and County of New York.

But the Court said that the members of the fire department of this City owe their allegiance to the City not as members of a corporation, but as members of an organization identified with the administration of the City government and forming a part of its protective police; that the powers exercised by the city corporation in reference to the fire department are conferred and employed exclusively for the public benefit, and the corporation cannot be held liable as a master for the wrongful acts of firemen.

The Court said, in reference to the duties of the firemen:

> "They are for the pecuniary benefit of the in-
> "habitants of the city as well as for their personal

" safety. They result in no benefit or advantage
" to the defendants other than to individuals, and
" then only when a loss or disaster is averted by
" their efforts. The powers exercised, therefore,
" by the defendants in reference to the fire depart-
" ment are conferred and employed exclusively
" for the public benefit, not for purposes of private
" advantage or emolument, and this is an answer
" to the plaintiff's claim (The Mayor, etc. *vs.*
" Bailey, 2 Denio, 433; Lloyd *vs.* The Mayor, etc.,
" 5 N. Y., 369; Griffin *vs.* The Mayor, etc., 9 N.
" Y., 456)."

In 1875 it was held that the City was not liable for the acts of the Metropolitan Fire Department, and the Court, after showing by its citation of authorities that it did not regard the fact as to whether or not the department was created under the City charter one of importance, said:

" In the management of the property and ap-
" paratus and in their acts put forth in the extin-
" guishment of fires, the firemen act not for the
" city corporation, but for the general public."

Woolbridge *vs.* The Mayor, 49 How. Pr., 67.

And a much later case decided under the present Consolidation Act, that is to say, *under the law as it stands to-day*, also held that *the present corporation* was not liable for the negligent action of the employees of the fire department while engaged in testing a fire tower prior to its purchase by the City for use in the said department.

This case was Thompson *vs.* The Mayor, 52 Super., 427, a case decided by the General Term of the Superior Court in 1885.

This case last cited is exactly in point.

In the Court of Appeals also, while there the exact question here under discussion has never been squarely passed upon), yet in a decision which has become a leading case as to *ultra vires* of municipal corporations (Smith *vs.* City of Rochester, 76 N. Y., 506), after stating that the Common Council of Rochester exceeded its powers in ordering a midnight parade of the Fire Department for the celebration of the Centennial, the Court added :

> " Assuming, however, that the Common Council, " in making an order for a midnight parade of the " fire department to celebrate the centennial anni- " versary of the nation, had authority under the " provisions last cited, the difficulty in maintaining " the plaintiff's action is **the well-settled rule " that a municipal corporation is not " liable for the negligence of firemen " while engaged in the line of their duty** " (Dillon on Municipal Corporations, sec. 774 ; Haf- " ford *vs.* New Bedford, 16 Gray, 297 ; Fisher *vs.* " Boston, 104 Mass., 87 ; Jewett *vs.* City of New " Haven, 38 Conn., 368 ; O'Meara *vs.* The Mayor, " 1 Daly, 425).
>
> " The exemption from liability in most of the " cases last cited is placed upon the ground that " *the service is performed by the corporation for the " public good in obedience to law in which it has no " particular interest, and from which it derives no " particular benefit in its corporate capacity ;* that " the members of the Fire Department are not the " agents and servants of the city for whose conduct " it is liable, but act as officers charged with a " public service for whose negligence in the dis- " charge of official duty no action lies against the " city, and a maxim of *respondeat superior* has no " application."
>
> Smith *vs.* City of Rochester, 76 N. Y., 513.

And in a later case, Terhune *vs.* The Mayor, etc., of the City of New York, 88 N. Y., 247, and which was decided long after the union of the City and County of New York, the Court of Appeals held that the Fire Commissioners of the City of New York are public officers, not agents of the City, and that for their acts in wrongfully removing an officer in the Fire Department the City is not liable.

These are all the cases upon the subject in the State of New York, and none of them have ever been questioned or distinguished.

It is, therefore, respectfully submitted that the law of the State of New York to-day is that the City of New York is not responsible for the wrongs of its Fire Department.

VI.

The judgment should be reversed with costs.

Dated New York, February 11, 1895.

FRANCIS M. SCOTT,
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For the Mayor, Aldermen and Commonalty
of the City of New York, Respondents-
Appellants.

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( )

[REG. , FOL. .]

Schedule B.

United States Court of Appeals

FOR THE SECOND CIRCUIT.

ROBERT W. WORKMAN,
Libelant and Appellee,

against

THE MAYOR, ALDERMEN and COMMONALTY OF THE CITY OF NEW YORK, and JAMES A. GALLAGHER,
Respondents and Appellants.
(Impleaded with the Fire Department of the City of New York.)

Brief in reply for the Respondent and Appellant The Mayor, Aldermen and Commonalty of the City of New York.

The brief served under the rules of this Court on behalf of the libellant and appellee is, we are glad to confess, a most learned and philosophical discussion of what the law might be; but we respectfully submit that the conclusions reached are altogether at variance with what the law actually is and has been, as settled by the courts for many years.

At page 2 of the brief of the appellee the position of the appellant, the Mayor, Aldermen and Commonalty

of the City of New York, is incorrectly stated. It is not now, and never was contended by the City of New York, that the Federal Courts have no jurisdiction to render a decree against the municipality, but the claim that is now made is that the municipality is not, in law, responsible for the acts of the agents and servants of the Fire Department of the City of New York. If the responsibility of the City for the acts of the agents and servants of the Fire Department has been denied by the State Courts, assuming that the question of law involved has been decided nowhere except in the State of New York, this Court will follow the law as so laid down.

In the case of Detroit *vs.* Osborne, the Supreme Court of the United States, Mr. Justice Brewer delivering the opinion of the Court, said, and quoting from the opinion in the case of Bucher *vs.* The Railroad Company, 125 U. S.:

> " It may be said generally that whenever the de-
> " cisions of the State Courts relate to some law of
> " a local character which may have become estab-
> " lished by those Courts, or has always been a
> " part of the law of the State, that the decisions
> " upon the subject are usually conclusive, and al-
> " ways entitled to the highest respect of the Fed-
> " eral Courts."

Detroit *vs.* Osborne, 135 U. S., 499.

And to the same effect Burgess *vs.* Seligman, 107 U S., 20; Clareborn *vs.* Brooks, 111 U. S., 400.

Counsel for the appellee is in error in assuming that the contention now made by the Mayor, Aldermen and Commonalty of the City of New York is made upon the assumption that the City of New York is entitled, at the hands of this Court, to any greater consideration in the application of what the learned counsel terms " common-law technicalities " than any other suitor.

The question is not one of legal technicality, but of principle, decided by the Courts of this State, and of many of the States in the Union upon what have been held to be grounds of sound public policy, and on the brief in chief this proposition is amply sustained by authority. We are not, however, limited to the discussion of the principle of no liability on the part of the City for the acts of the Fire Department to mere inference or argument that the law as laid down by the State Courts will be followed by the United States Courts.

In the case of Haight and another against The Mayor, Aldermen and Commonalty of the City of New York, decided by the learned Judge of the District Court in May, 1885, the general principle now contended for was approved, and the libel in that case dismissed.

In the opinion in that case Mr. Justice Brown said :

> "These facts bring the case, so far as I can see "entirely within the decision in the case of Max- "milian *vs.* The Mayor, 62 N. Y., 161, where the "responsibility of the corporation for the negli- "gent acts of persons in the employ of the De- "partment of Charities and Corrections is dis- "cussed by Folger, *C. J.*, with his usual fullness "and learning ; and the conclusion was there ar- "rived at, sustained by principle and authority, "that the corporation could not be held for the "negligent acts of the employees of that depart- "ment, because it is an independent board, over "which the corporation has no control, and which "does not act for the use or the benefit of the cor- "poration in the discharge of any of its corporate "functions or duties."
>
> Haight *vs.* The Mayor, 24 Fed. Rep., 93.

In the case of Edgerton *vs.* The Mayor, also decided by Mr. Justice Brown and in which the differences between the liability of the City for the acts of the

different departments were fully discussed, Mr. Justice Brown says:

> "I deem it unnecessary to consider here the "somewhat nice distinctions which have been "made in the several cases decided in the Court "of Appeals in this State as regards the liability "of a city corporation for the negligent acts of the "servants employed under its different heads of "departments as constituted by law. As respects "negligence by the employees of the Department "of Public Charities and Correction, of the *Fire* "*Department*, and of the Board of Education, it "has been adjudged that the corporation is not "liable. (Maxmilian *vs.* Mayor, etc., 62 N. Y., "166; Smith *vs.* City of Rochester, 76 N. Y., 506; "Ham *vs.* Mayor, etc., 70 N. Y.. 459. The first of "these cases was followed by this Court in the "case of Haight *vs.* Mayor, etc., 24 Fed. Rep., "93.
>
> Edgerton *vs.* The Mayor, 27 Fed. Rep., 232.

It would seem, then, as though the very proposition that is now under discussion had been decided by the Judge below as a principle of law in a manner at variance with the conclusions reached by the District Court in this cause.

This brief is filed in reply mainly to correct certain misapprehensions apparent in the brief filed by the appellee as to the contention made by The Mayor, etc., of the City of New York, and certain errors of fact as to the proposition that the question now under discussion had not been adjudicated in the Federal Courts.

Dated New York, March 9, 1895.

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Proctor for The Mayor, etc., of the City of New York.

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Brief of Scott for Appls.

[REG. 44, FOL. 446.]

Filed Apr. 2, 1897.

Supreme Court of the United States.

THE MAYOR, ALDERMEN AND COMMONALTY OF THE CITY OF NEW YORK, *Appellants*,

against

ROBERT W. [illegible], *Appellee*.

JAMES A. GALLAGHER,

Supreme Court, U. S.
FILED
APR 2 1897
JAMES H. MCKENNEY,
CLERK.

Brief in behalf of the Mayor, Aldermen and Commonalty of the City of New York on hearing on Certiorari.

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[REG. 44, FOL. 448.]

Supreme Court of the United States.

THE MAYOR, ALDERMEN AND COMMONALTY OF THE CITY OF NEW YORK and JAMES A. GALLAGHER,
Appellants,

against

ROBERT W. WORKMAN,
Appellee.

Certiorari to the United States Court of Appeals for the Second Circuit.

Brief in behalf of the Mayor, Aldermen and Commonalty of the City of New York on hearing on Certiorari.

This is a review by a writ of *certiorari* by libellant, Robert W. Workman, of the determination of the United States Circuit Court of Appeals for the Second Circuit, which reversed (Record, p. 133) a decree of the District Court for the Southern District of New York, which latter decree had been in favor of the libellant. The facts as disclosed by the record are as follows:

The appeal by libellant to the United States Circuit Court of Appeals was from a decree of the District Court awarding the libellant and appellee the

sum of $815.84 as damages, interest and costs, against the Mayor, Aldermen and Commonalty of the City of New York and against James A. Gallagher, pilot of the fire-boat "New York."

On Sunday the 11th day of June, 1893, the barkentine "Linda Park" was lying on the easterly side of Pier 48, East river, and moored a sufficient distance in toward the bulkhead, with her bow pointing toward the river, to allow of a schooner's being moored to the same pier with *her* bow *in* toward the bulkhead, allowing a space of some 6 feet between the ends of the respective bowsprits (Record, pp. 9, 38), and alongside of the barkentine "Linda Park" lay a barge with a beam of from 30 to 35 feet (Record, p. 38). On the opposite pier and on the westerly side of Pier 49 was a covered railroad barge with a beam of some 40 feet (Record, p. 39).

By reference to a diagram in the case, the respective dimensions of the piers and bulkhead and the extent of the open water between Piers 48 and 49 will appear as follows: The width of the bulkhead between the piers is shown to be 129 feet, and 54 inches; the length of Pier 48 is shown to be 329 feet and 58 inches; and the length of Pier 49, 324 feet and 99 inches; and the clear water between the piers at the extreme ends upon the river front, 126 feet and 42 inches.

Allowing for the closing of the clear water between the extreme ends of Piers 48 and 49, by the width of the barge at 40 feet, lying practically at the end of Pier 49, alongside the pier, and the width of the schooner lying practically at the extreme end of Pier 48 at 30 feet, the 126 feet and 42 inches of clear water is reduced by 70 feet, leaving 56 feet and 42 inches of clear water between Piers 48 and 49.

Some time between 3 and 4 o'clock Sunday afternoon, June 11, a fire broke out at the corner of Clinton street,

and both the fire-boats "New Yorker" and "Havemeyer" were summoned by telegraph to the scene. At the time the tide was running strong flood and the "Havemeyer" (known as Engine Company No. 43) coming down the East river and against the tide, from her station at the foot of Grand street, running in between Piers 48 and 49, made fast to the proper place at the bulkhead, and commenced to play upon the fire (see Record, pp. 54 and 55).

The "New Yorker," a larger and heavier boat, summoned from her station, Pier 1, North river, coming up with the tide and attempting to enter the slip, was caught by the eddy between the piers and swept against the "Linda Park." At the time the "New Yorker" reached the slip, according to the testimony of the libelant's witnesses, the fire had been under way some 20 or 30 minutes and was then blazing (see Record, p. 53, fol. 210).

For the injury done to the barkentine, on the 27th day of July, 1893, a libel was filed against the Mayor, Aldermen, and Commonalty of the City of New York as sole respondents. On the 8th day of August, 1893, an answer was interposed by the Mayor, Aldermen and Commonalty, defending both upon the merits and upon the law, upon the ground that they were not responsible for any acts of negligence committed by the servants and employees of the Fire Department (see Record, pp. 3–11).

This case having been on the calendar of the District Court for a number of days and answered "ready," the respondents, the Mayor, Aldermen and Commonalty of the City of New York, on the 9th day of November, 1893, were ordered to show cause why the libel should not be amended by making the Board of Fire Commissioners of the City of New York and the captain of

the fireboat "New Yorker" parties defendant therein (Record, p. 3).

The motion to amend the libel coming on to be heard before the District Judge on November 10, 1893, the District Judge allowed the amendment prayed for and allowed the respondent to bring in both the Fire Department and the defendant Gallagher, but upon the ground that

> "The authorities cited in the defendants' brief "make it apparently very doubtful whether the "libelant can recover against the City for the "faults of the Fire Department, however clear the "fault of the 'New Yorker' may be" (see Record, "page 15).

Upon the order entered upon that decision of December 1, an amended libel was filed against the Mayor, Aldermen and Commonalty of the City of New York, against the Fire Department of the City of New York and James A. Gallagher, the pilot (see Record, p. 17).

On the 12th the defendant Gallagher filed his answer defending upon the merits (see Record, pp. 21-27.) The respondent, the Fire Department, excepted to the libel for want of sufficiency, in that the amended libel failed to allege in what capacity the Fire Department of the City of New York was sued, and failed also to allege whether the Fire Department of the City of New York was a corporation, foreign or domestic, and because also there was no negligence charged in the amended libel against the Fire Department (see Record, p. 28).

These exceptions coming on to be heard on the 27th day of December, 1893, the District Court entered an order sustaining certain of the exceptions as therein re-

cited (see Record, p. 29), and thereafter an amendment to the amended libel was filed (see Record, p. 31), and thereafter the Fire Department answered (see Record, pp. 32-35), and the questions involved were at issue between all the parties of the record.

The case came on to be heard before the Judge of the District Court on the 9th day of April (see Record, p. 36), and thereafter the District Court decreed that the libel be dismissed as against the Fire Department of the City of New York, but rendered a decree against both the Mayor, Aldermen and Commonalty of the City of New York and against James A. Gallagher, the pilot.

Upon appeal to the United States Circuit Court of Appeals for the Second Circuit this decree of the District Court was reversed, except as to the provisions thereof relating to the Fire Department of the City of New York, and as to the appellant James A. Gallagher, and as to said James A. Gallagher the decree of said District Court was affirmed with costs.

An application was made to the Circuit Court of Appeals upon petition that the questions in the case be certified to this Court (Record, pp. 135-137). This application was denied, and the case is now brought here upon a writ of certiorari (Record, p. 139).

In support of the determination of the Circuit Court of Appeals the respondent respectfully submit the following:

POINTS.

I.

The Mayor, Aldermen and Commonalty of the City of New York are not liable to an action for damages on account of the negligence of the officers or employees appointed or employed by the Commissioners of the Fire Department in the performance of their public duties.

This exemption from liability springs from the nature of the duty performed by the officers and members of the Fire Department.

The extinguishment of fires is undertaken as a public or governmental duty, imposed for the public or general benefit, and from which the Corporation derives no corporate benefit or emolument.

The distinction between the powers and duties of municipal corporations from which corporate emolument is derived and those functions which are purely governmental, performed for the public good, from which no benefit or revenue comes to the Corporation, is made the test of liability for the consequence of neglect on the part of the agents necessarily employed by the Corporation.

In Dillon on Municipal Corporations, vol. 1, p. 107, 4th ed., it is said, concerning municipal corporations, that they "possess a double character; the one gov-"ernmental, legislative, or public; the other in a sense "proprietary or private.

"The distinction between these, though sometimes "difficult to trace, is highly important and is frequently "referred to, particularly in the cases relating to the

"implied or common-law liability of municipal cor-
"porations for the negligence of their servants, agents,
"or officers in the execution of corporate duties and
"powers."

Dillon on Municipal Corporations, 4th ed., vol. 2, page 1180, section 966, further says that municipal corporations are "considered to be impliedly liable (un-
"less the legislation negatives such liability) for wrong-
"ful acts done in what is termed their private or cor-
"porate character from which they derive some special
"or immediate advantage or emolument, but not as to
"such acts done in their public capacity as governing
"agencies in the discharge of duties imposed for the
"public or general (not corporate) benefit."

The following cases are cited in support of the doctrine thus defined:

Oliver *vs.* Worcester, 102 Mass., 489.
Richmond *vs.* Long's Adm., 17 Gratt., 375.
Petersburg *vs.* Applegarth, 28 Gratt., 321.
Western Savings Fund Society *vs.* Philadelphia, 31 Pa. St., 175, 189.
Bailey *vs.* The Mayor, 3 Hill, 531.
Maximilian *vs.* The Mayor, 62 N. Y., 160.

The following is quoted from Oliver *vs.* Worcester, 102 Mass., 489:

"The distinction is well established between the
"responsibilities of towns and cities for acts done
"in their public capacity in the dischage of duties
"imposed on them by the Legislature for the pub-
"lic benefit, and for acts done in what may be
"called their private character, in the management
"of property and rights voluntarily held by them
"for their own profit and advantage as a corpora-

" tion, although inuring ultimately to the benefit
" of the public."

In Bailey *vs.* The Mayor, 3 Hill, 531, the distinction between the public and private capacity of municipal corporations is maintained by Chief Justice Nelson. He says, in relation to municipal powers:

" If granted for public purposes exclusively they
" belong to the corporate body in its public politi-
" cal or municipal character. But if the grant was
" for the purposes of private advantage and emolu-
" ment, though the public may derive a common
" benefit therefrom, the corporation, *quoad hoc*, is
" to be regarded as a private company."

And from such considerations the question of liability in the case was determined.

In the same case, 2 Denio, 433, the same distinction between governmental duties exercised for public benefit, and the duties through which the corporation derives benefit for itself is maintained, and the exemption contended for in the case at bar recognized, as follows:

" On the other hand, where such corporation is
" bound to appoint an officer for the performance
" of a public duty it is not liable " (p. 446).

In Maximilian *vs.* The Mayor, 62 N. Y. Rep., the Court of Appeals say:

" There are two kinds of duties which are im-
" posed upon a municipal corporation: One is of
" that kind which arises from the grant of a
" special power, in the exercise of which the
" municipality is as a legal individual; the other
" is of that kind which arises, or is implied, from
" the use of political rights under the general law,
" in the exercise of which it is as a sovereign. The

" former power is private, and is used for private " purposes; the latter is public and is used for " public purposes (Lloyd *vs.* The Mayor, 5 N. Y., " 374). The former is not held by the munici- " pality as one of the political divisions of the " State; the latter is. In the exercise of the for- " mer power, and under the duty to the public " which the acceptance and use of the power in- " volves, a municipality is like a private corpora- " tion, and is liable for a failure to use its power " well, or for an injury caused by using it badly. " But where the power is intrusted to it as one of " the political divisions of the State, and is con- " ferred, not for the *immediate* benefit of the mu- " nicipality, but as a means to the exercise of the " sovereign power for the benefit of all citizens, the " corporation is not liable for nonuser, nor for " misuser by the public agents (Eastman *vs.* " Meredith, 35 N. H., 284).

" Where the duties which are imposed upon " municipalities are of the latter class, they are " generally to be performed by officers who, " though deriving their appointment from the " corporation itself, through the nomination of " some of its executive agents, by a power de- " volved thereon as a convenient mode of exer- " cising a function of government, are yet the " officers, and hence the servants, of the public " at large. They have powers and perform duties " for the benefit of all the citizens, and are not " under the control of the municipality, which has " no benefit, in its corporate capacity, from the per- " formance thereof. They are not then the agents " or servants of the municipal corporation, but " are public officers, agents or servants of the " public at large, and the corporation is not re- " sponsible for their acts or omissions, nor for the

" acts or omissions of the subordinates by them
" appointed (Fisher *vs.* Boston, 104 Mass., 87).
" And where a municipal corporation elects or
" appoints an officer, in obedience to an act of the
" legislature, to perform a public service, in which
" the corporation has no private interest, and from
" which it derives no special benefit or advantage
" in its corporate capacity such officer cannot be
" regarded as a servant or agent of the munici-
" pality, *for whose negligence or want of skill it can*
" *be held liable.*"

" It has appointed or elected him, in pursuance
" of a duty laid upon it by law, for the general
" welfare of the inhabitants or of the community."

In the same case the Court further says :

" Where it (the City) authorizes a use of its cor-
" porate property which use itself makes that
" property harmful to others, it is liable. Such is
" understood to be one of the grounds on which
" went Bailey *vs.* The Mayor (2 Denio, 433). And
" the duty of keeping in repair streets, bridges, and
" other common ways of passage, and sewers, and
" a liability for a neglect to perform that duty rests
" upon an express or implied acceptance of the
" power and an agreement so to do. It is a duty
" with which the City is charged for its own cor-
" porate benefit, to be performed by its own agents
" as its own corporate act (Conrad *vs.* Trustees of
" Ithaca, 16 N. Y., 158). It is not always easy to
" say within which class a particular case should
" be placed. But when it is determined that the
" power and duty are given and taken for the ben-
" efit of the corporation as a corporate body
" and the act to be done is to be done by it
" through agents of its appointment and under
" its control and power of removal, there is no

"doubt of its liability for negligent omission or "negligent attempt at performance. When the "powers created and duly enjoined are given, and "laid upon officers to be named by the corporation, "but for the public benefit and as a convenient "method of exercising a function of general gov- "ernment, and the corporation has no immediate "control nor immediate power of removal of those "officers, nor of their subordinates and servants, "then it is not liable for their negligent omission "or action."

The doctrine of Maximilian *vs.* The Mayor has been repeatedly reaffirmed and enforced by the Court of Appeals of the State of New York in subsequent cases.

In Bieling *vs.* The City of Brooklyn, 120 N. Y. Rep., p. 98, where there was a recovery for damages sustained in consequence of the fall of a wooden awning in a street of the city, the Court says :

"The municipality can perform its functions "only through officers or agencies. For the dis- "charge of those powers of a governmental or "political character, which are vested by the "statute in officers, and those duties not placed "upon it but upon officers or departments created "and vested with powers for public purposes, as "distinguished from those for the purposes of the "corporation, it is not responsible for their mis- "conduct or neglect, to individuals suffering dam- "ages as the result of it (Lloyd *vs.* Mayor, etc., 5 "N. Y., 374 ; Maximilian *vs.* Mayor, etc., 62 *id.*, "160 ; Ham *vs.* Mayor, etc., 70 *id.*, 459 ; Smith *vs.* "City of Rochester, 76 *id.*, 506).

"There are various duties which are legitimately "those of the corporation, amongst which is that "of taking care of the streets within it. To keep

"them in safe condition for public use was a "primary duty resting upon the City of Brooklyn."

The same principle has been adjudicated in other States.

In Mead *vs.* New Haven, 40 Conn., 72, where a City, under power given by its charter, appointed an inspector of steam boilers within the City, and by by-law imposed a penalty on any person who should use such a boiler without having it tested by the inspector, it was held that the City was not liable for negligence of the inspector in the discharge of his duty.

The Court says:

"The duty of inspection of boilers is govern- "mental. The object of the inspection is to pro- "tect all citizens from danger, who may come in "contact with the boiler, or may be exposed in "any way to danger from its unsafe condition. "The City, as such, has no pecuniary or individual "or private interest in the matter, and although "the power of the City over the subject is con- "ferred by the charter, and not by the general "law, yet the City must, we think, be regarded as "the agent of the government, and, acting for the "State, and not for itself, in making the appoint- "ment of inspectors, and therefore not liable for "the inspector's negligence."

See also—

Brown *vs.* Vinalhaven, 65 Maine, 402.
Mitchell *vs.* Rockland, 52 Maine, 118.

II.

This exemption from liability growing out of the nature of the duties performed is recognized and enforced, even when the duties are defined, and the executive officers created to perform the same by provisions in the charter, or organic act creating the municipal corporation, as well as when the duties are imposed upon corporate officers by independent statutes.

In Maxmilian *vs.* Mayor, the servant by whose negligence the plaintiff was injured, was appointed by the Commissioners of Charities and Correction, corporate officers, to whom was intrusted the execution of the laws in relation to the relief of the poor sustained in the almshouses and hospitals, and in relation to criminals in custody in the public prisons.

Such Commissioners were, in the first instance, invested with power by an independent act, chapter 510 of the Laws of 1860, p. 1026.

At the time of the occurrence by which the plaintiff was injured, the Commissioners of Charities and Correction had become a department of the City Government, under and pursuant to section 80, chapter 137 of the Laws of 1870, the City Charter, provided for, as such department, by specific provisions in the Charter of the City, authorized to exercise all the powers and duties defined by the Act of 1860.

The Court notices the creation of the Commissioners by the Act of 1860 and subsequent transformation into a department of the City Government, as follows:

> "By this act (the Act of 1860) that department
> "is created in the City and County of New York,
> "and it is declared that there shall be chief officers

"thereof, and their name of office is designated "(sec. 1). They thereby have their appointment "from the Comptroller of the City and County, "though since then they are made a department of "the City and appointable by the Mayor (Laws of "1870, chap. 137, p. 366, sections 29–30; p. 386, "sec. 80).

The Court further say:

"The Commissioners of Charities and Correc- "tion are public officers, though getting their right "of office from a circumscribed locality; and the "acts which they may do are to be done in their "capacity as public officers, in the discharge of "duties laid upon them by the law for the public "benefit, and far removed from acts done by city "or town, in its municipal character, in the man- "agement of its property for its own profit or "advantage. It is seen at once that the powers "and duties of the Commissioners of Charities and "Correction are not to be exercised and performed "for the especial benefit of the defendant (the City "of New York). It gets no emolument therefrom, "nor any good as a corporation. It is the public, "or individuals as members of the community, "who are interested in the due exercise of these "powers and the proper performance of their "duties."

The analogy between the duties of the Commissioners of Charities and Correction and of the Fire Commissioners, as to the public, governmental character thereof, is complete; and the Fire Department, although an executive department of the City Government, still performs duties which pertain not to the emolument of the Corporation or its special benefit, and which pertain only to the public good and the performance of a public duty.

The Fire Department originated also by a system of laws similar to the laws by which the Department of Charities and Correction was created.

Prior to 1865 the extinguishment of fires was undertaken by volunteer associations, to which the municipality furnished apparatus, and by ordinances regulated, in some respects, the government thereof.

For the acts or negligence of such associations, their officers or members, when engaged in extinguishing fires, the Courts held that the Corporation was not liable.

O'Meara *vs.* The Mayor, 1 Daly, 425.

By chapter 249 of the Laws of 1865, page 395, the Metropolitan Fire District was established; the appointment of Commissioners provided for; an elaborate provision made for the government and discipline of the officers and members thereof; the duties defined, and provision made for the payment to the officers and members for service performed.

Subsequently by section 30, chapter 137, Laws of 1870, being the City Charter, a Fire Department was created in the City Government, and by section 1 of the same act, as amended by section 16 of chapter 574, Laws of 1871, the Municipal Fire Department was constituted, consisting of a board of five persons authorized to perform all the duties prescribed by the Act of 1865, in relation to the extinguishment of fires.

The Fire Department thus became a charter department, empowered and authorized to execute the State law in respect to a duty in which the City has no pecuniary or private interest, and in which the department is still to be regarded as the agent of the State Government, acting for the State in executing governmental power for the public and not for the corporate benefit.

The educational establishment of the City is another instance of a department created within the City Government, authorized to discharge duties not local or corporate, but related to and belonging to the administration of the State Government; which, although formally a department of the Municipal Government, is still, by the decision of the Court of Appeals, recognized as an administrative branch of the State Government, for which the City is not liable in damages in respect to negligence of an employee of the department.

Ham *vs.* The Mayor, 70 N. Y. Rep., 459.

It therefore may be considered to be the established doctrine, that if the nature of the duty performed is governmental and not corporate, the City is exempt from liability for the negligence of an officer, agent or servant appointed by it to execute such duty, even when the duty is cast upon a department or officer of the municipality, by specific provisions in the corporate charter.

III.

The duties of a fire department are governmental and not corporate, and consequently of the class upon which corporate liability for the negligence of the officers or servants employed therein cannot be predicated.

It is said in Dillon on Municipal Corporations, above quoted, that the distinction between corporate and governmental duties is well established, though difficult to trace. It is therefore proper to refer to the concrete cases in which the Courts have defined the distinction.

(*a*) It is well settled that the caring for public streets, keeping them in order for safe and convenient use, regulating, grading and paving them, is deemed to be a duty assumed by the corporation, in consideration of the privileges granted by its charter, performed for its corporate advantage, and therefore that liability in damages is cast upon the corporation, in case of negligence on the part of its officers, agents or servants in respect to the performance of such duties.

Maximilian *vs.* The Mayor, *supra.*
Bieling *vs.* City of Brooklyn, 120 N. Y. Rep., 106.
Ehrgott *vs.* The Mayor, 96 N. Y.
Rehberg *vs.* The Mayor, 91 N. Y. Rep., 144.
Hume *vs.* The Mayor, 74 N. Y. Rep., 264.

The duties performed by the Commissioners of Charities and Correction in support of the poor, and the confinement of prisoners under criminal charges, and the performance of duties connected with the maintenance of the school system have been distinctly defined by the Court, as falling within the class of governmental duties performed for the public and not corporate benefit, and no liability for negligence on the part of the officers, agents or servants employed therein is imputed.

Maximilian *vs.* The Mayor, 62 N. Y. Rep., 162.
Ham *vs.* The Mayor, 70 N. Y. Rep., 459.

In respect to the extinguishment of fires, the decisions of the Courts in all the States agree in including that duty among the governmental functions performed by municipal corporations in behalf of the public, as to which the corporation is exempt from liability in damages for neglect of the officers, agents or servants employed therein.

In the American and English Encyclopædia of Law, volume 7, page 997, it is said:

> "The members of the fire department of a "municipality are public officers, and not the mere "servants of the municipality; and, in the absence "of an express statute, the municipal corporation "is not liable for injuries occasioned by the negli- "gence of the members of its fire department in "performing their duties."

And this doctrine is supported by numerous cases cited.

The text books are emphatic and clear on the subject, and maintain the same doctrine.

Judge Dillon's well-known work has already been referred to.

In the latest book on the subject it is said:

> "Municipal corporations are not liable for the "negligence of their firemen—although they may "be appointed and removed by the city, and the "performance of duties are wholly subject to its "control."
>
> Tiedeman on Municipal Corporations, sec. 333*a*.

And another very recent work also says:

> "Members of a fire department, as officers "charged with a public service, are not the agents "or servants of the city which appoints them, and "the city is therefore not liable for their negligent "discharge of official duty, nor is it liable for neg- "ligence in the performance of a public duty im- "posed by law" upon its members.
>
> 1 Beach on Public Corporations, sec. 744.

And see also

Jones on Negligence of Municipal Corporations, sec. 31.

After a careful search of the authorities, and after throwing aside a great number of decisions which relate to failure to supply water, and which, although bearing upon the question, are not absolutely in point, the following authorities will be found to sustain, without exception and under the varying circumstances therein discussed, the doctrine of the non-liability of a municipal corporation for the acts of its fire department.

And the attention of the Court is most earnestly called to the fact already pointed out, that in the decisions no distinction whatever is drawn between fire departments organized by a distinct and separate law of the State, and fire departments which are organized under a city charter, or which by the wording of the statutes creating them, form an integral part of the administration of the City Government, although not specifically named in the City Charter.

The following are the principal cases, with a short memorandum of the facts under which they arose:

Hafford *vs.* New Bedford, 16 Gray, 297 (hose-carriage on way to fire running over person).

Fisher *vs.* Boston, 104 Mass., 87 (injuries from bursting hose).

Burrill *vs.* Augusta, 78 Me., 118 (frightening horse by escaping steam from engine left in street).

Wild *vs.* Patterson, 47 N. J. Law, 406 (injury arising from defect in brake of engine).

Hayes *vs.* Oshkosh, 33 Wis., 314 (fire caused by negligent management of engine, allowing escape of sparks, etc).

Kies *vs.* Erie City, 135 Pa. St., 144 (negligent arrangement of engine-house doors).

Wilcox *vs.* City of Chicago, 107 Ill., 334 (collision with hook-and-ladder wagon).

Edgerly *vs.* Concord, 59 N. H., 78 (negligent testing of hydrant).

Howard *vs.* San Francisco, 51 Cal., 52 (collision with engine).

McKenna *vs.* St. Louis, 6 Mo. App., 320 (negligent running of hose-carriage).

Jewett *vs.* New Haven, 38 Conn., 368 (negligent driving of hose-carriage).

Heller *vs.* Sedalia, 53 Mo., 159 (want of proper exertions to extinguish fire).

Grube *vs.* St. Paul, 34 Minn., 402 (careless driving of hose-carriage).

Wheeler *vs.* Cincinnati, 19 Ohio St., 19 (insufficient water and insufficient efforts to extinguish fire).

Brinkmeyer *vs.* Evansville, 29 Ind., 187 (insufficient water and engines out of repair).

Robinson *vs.* Evansville, 87 Ind., 334 (hose insufficient in length to reach fire).

Welsh *vs.* Rutland, 56 Vt., 228 (slipping on ice arising from water escaping from a fire-hydrant).

Greenwood *vs.* Louisville, 13 Bush, 226 Ky. (engine negligently running over person on sidewalk).

Freeman *vs.* Philadelphia, 7 W. N. C., Pa., 45 (injuries from careless driving of engine).

Knight *vs.* Philadelphia, 15 W. N. C. Pa., 307 (injuries from careless driving of fire-engine).

Dodge *vs.* Granger, 17 R. I., 664; 24 Atl. Rep., 100 (negligent projection of ladder from engine-house).

Lawson *vs.* City of Seattle, 6 Wash., 184; 33 Pac. Rep., 347 (defective brace).

Gillespie *vs.* City of Lincoln, 35 Neb., 34; 52 N. W. Rep., 811 (killing by ladder-wagon).

Simon *vs.* Atlanta, 67 Ga., 618 (collision with rope stretched across street by municipality to allow parade of Fire Department).

In Hafford *vs.* New Bedford, 16 Gray, 297, already cited, it is said:

> "The members of the Fire Department of New "Bedford, when acting in the discharge of their "duties, are not servants or agents in the employ- "ment of the city, for whose conduct the city can "be held liable; but they act rather as officers of "the city, charged with the performance of a cer- "tain public duty or service, and no action will "lie against the city for their negligence or im- "proper conduct while acting in the discharge of "their official duty."

In this case the members of the Fire Department were acting under a law which had been accepted by a popular vote of the citizens, and made a part of the organic law of the City, and the officers and members were paid from the City treasury for their services.

In Fisher *vs.* Boston, 104 Mass., 87, the City was held not to be liable for a personal injury to the plain-

tiff caused by the bursting of a hose attached to a fire engine.

The Court say:

> "It makes no difference whether the Legislature "itself prescribes the duties of the officers "charged with the repair and management of fire-"engines, or delegates to the city or town, the "definition of those duties by ordinance or by-"law. However appointed or elected, such per-"sons are public officers, who perform duties im-"posed by the law for the benefit of all the "citizens, the performance of which the city or "town has no control over, and derives no benefit "from, in its corporate capacity. The acts of such "public officers are their own official acts, and not "the acts of the municipal corporation or its "agents."

In Jewett *vs.* New Haven, 38 Conn.. 368, where the plaintiff was negligently run into and injured by the driver of a hose-cart, a member of the Fire Department, who was hastening to the engine-house to procure additional hose for use at a fire; held, that the members of the Fire Department, when engaged in extinguishing fires, are performing a public, governmental act for the general good, and cannot be regarded as servants of the City, for whose negligence it can be held liable.

The Fire Department in this case was a paid fire department, organized under a law accepted by a popular vote of the citizens of the city, and made a part of the organic law of the municipality.

The quotation from the opinion of Chief Justice Butler, inserted by the learned Trial Judge in his opinion in the case at bar, is a quotation from a dissenting opinion, and while doubtless quoted by the

Court Justice below as well expounding Judge Butler's views, yet defines the doctrine which was condemned by the decision in the case.

In Knight *vs.* Philadelphia, 15 W. N. C. (Pa.) 307, the Court says:

> "The members of the Fire Department are not "such servants of the Municipal Corporation as "to make it liable for their acts of negligence. "Their duties are of a public character and for a "high order of public benefit. The fact that the "act of Assembly did not make it obligatory on "the City to organize a Fire Department, does not "change the legal liability of the municipality for "the conduct of the members of the organization. "The same reason which exempts the City from "liability for the acts of its policemen applies "with equal force to the acts of its firemen."

In O'Meara *vs.* The Mayor, 1 Daly, 425, the Court says:

> "The powers exercised by the defendants in re- "ference to the Fire Department, are conferred "and employed exclusively for the public benefit, "not for purposes of private advantage and emol- "ument, and this is an answer to the plaintiff's "claim."

The definition of the Court in relation to the nature of the powers exercised by those who extinguish fires as officers of the Fire Department, is equally applicable to the department, organized under the present laws, as it was to the volunteer department, which was organized, sustained, and supplied by the City, at the time when the last mentioned case was decided.

IV.

The contention of the defendants in this case does not controvert the doctrine laid down in Barnes vs. The City of Columbia, 91 U. S. Rep., 530.

The action in that case was brought to recover for damages sustained by the plaintiff in consequence of falling into an excavation in the street, negligently left there by the Commissioners authorized to improve the streets.

The duty performed by the Commissioners, in behalf of the municipality, was the duty of caring for streets, which, in all the cases in this State, and all other States, is held to be a duty performed for the corporate benefit, as to which a liability in damages arises, if the officers charged with executive powers in respect thereto are negligent in the performance of their duty.

The duty which was performed by the Commissioners was a corporate duty, distinguishable from the governmental duty of extinguishing fires, which is performed for the public, and not for the corporate advantage and benefit.

Respondents argue, therefore, that the foregoing authorities and the principles thereby illustrated sustains the following proposition:

1st. That the municipal corporation, through the Fire Department, exercises powers which are purely governmental, for the public benefit; from which it derives no revenue or emolument as a corporation; therefore, that it is not liable for the consequence of the neglect of an agent necessarily employed by it, in the absence of express statute creating such liability.

The position of the defendants in relation to the performance of the duty of extinguishing fires, and its relation to the public, is clearly illustrated by the case of Murphy *vs.* The Commissioners of Emigration, 28 N. Y. Rep., 142.

The Commissioners of Emigration were public governmental agents, exercising their powers for the public good and not for their individual advantage or emolument.

They were sued for the value of property lost by the neglect of their agents.

It was argued in their defense that they were representatives of the government transacting public business through agents; that the government, and consequently the Commissioners, is not liable for the neglect of the agents if necessarily employed in transacting public business.

Citing—

Story on Agency, sec. 319.
Story on Bailment, sec. 462.
Seymour *vs.* Van Slyck, 8 Wendell 403 422.
United States *vs.* Kirkpatrick, 9 Wheaton, 435.
Whitfield *vs.* Lord de Spencer, Cowp., 342.

The Court says:

"The position of the defendants is distinguish-
" able from that of persons acting for their own
" benefit or employing others for their own benefit.
" They do not act for their own benefit or employ
" agents, clerks or servants for their own benefit,
" but for the benefit of the community at large."

Story on Agency, section 319, says :

> " The doctrine is now firmly established that
> " public officers and agents are not responsible for
> " the misfeasances or positive wrongs, or for the
> " nonfeasance or negligences of the servants and
> " other persons properly employed by and under
> " them, in the discharge of their special duties."

Upon the same principle, an action does not lie against the Postmaster-General for property lost in course of transmission through the mail.

> Whitfield *vs.* Lord De Spencer, Cowp., 342.

The controversy in the case at bar is altogether similar to the contention that the City is liable for the negligence or neglect of policemen employed by it in the preservation of the public peace.

That such liability does not exist is well settled.

> McKay *vs.* City of Buffalo, 9 Hun, 401; affirmed, 74 N. Y. Rep., 619.

Nor is a City liable for the acts of its Board of Health.

> Bamber *vs.* City of Rochester, 26 Hun, 587.

The doctrine of exemption from liability of municipal corporations for the neglect of police officers is now fixed beyond controversy ; the similarity in the nature of the duty performed by policemen and by firemen is obvious ; and that both perform governmental functions is obvious ; and the principle which exempts the municipal corporation by which both policemen and firemen are appointed or employed, is equally applicable as to both policemen and firemen.

V.

The law, as laid down by the Courts of the State of New York, is positive and clear.

As has already been suggested hereinbefore, the decisions of the various States cited draw no distinction between liability for the acts of a fire department organized under a city charter, and fire departments organized under separate and special acts, but performing their functions within a specific area.

This is important in view of the evident stress laid by the trial judge below upon the supposed distinction in the decisions of the State of New York between the powers of the New York City Fire Department as organized prior to, and as existing after the department became by statute a part of the administration of the City government.

The first case in the State has been already mentioned—O'Meara *vs.* The Mayor, 1 Daly, 425.

That case was decided under the law relating to the old fire department, and was before the union of the City and County of New York.

But the Court said that the members of the fire department of this city owe their allegience to the City not as members of a corporation, but as members of an organization identified with the administration of the City government and forming a part of its protective police; that the powers exercised by the city corporation in reference to the fire department are conferred and employed exclusively for the public benefit, and the corporation cannot be held liable as a master for the wrongful acts of firemen.

The Court said, in reference to the duties of the firemen:

> "They are for the pecuniary benefit of the inhabitants of the city as well as for their personal safety. They result in no benefit or advantage to the defendants other than to individuals, and then only when a loss or disaster is averted by their efforts. The powers exercised, therefore, by the defendants in reference to the fire department are conferred and employed exclusively for the public benefit, not for purposes of private advantage or emolument, and this is the answer to the plaintiff's claim (The Mayor, etc. *vs.* Bailey, 2 Denio, 433; Lloyd *vs.* The Mayor, etc., 5 N. Y., 369; Griffin *vs.* The Mayor, etc., 9 N. Y., 456)."

In 1875 it was held that the City was not liable for the acts of the Metropolitan Fire Department, and the Court, after showing by its citation of authorities that it did not regard the fact as to whether or nor the department was created under the City charter one of importance, said:

> "In the management of the property and apparatus and in their acts put forth in the extinguishment of fires, the firemen act not for the city corporation, but for the general public."
>
> Woolbridge *vs.* The Mayor, 49 How. Pr., 67.

And a much later case decided under the present Consolidation Act (L. 1882, ch. 410), that is to say, *under the law as it stands to-day* also held that *the present corporation* was not liable for the negligent action of the employees of the fire department while engaged in testing a fire tower prior to its purchase by the City for use in the said department.

This case was Thompson *vs.* The Mayor, 52 Super., 427, a case decided by the General Term of the Superior Court in 1885.

This case last cited is exactly in point.

In the Court of Appeals also, while there the exact question here under discussion has never been squarely passed upon, yet in a decision which has become a leading case as to *ultra vires* of municipal corporations (Smith *vs.* City of Rochester, 76 N. Y., 506), after stating that the Common Council of Rochester exceeded its powers in ordering a midnight parade of the Fire Department for the celebration of the Centennial, the Court added :

> " Assuming, however, that the Common Council, " in making an order for a midnight parade of the " fire department to celebrate the centennial anni- " versary of the nation, had authority under the " provisions, last cited, the difficulty in maintaining " the plaintiff's action is **the well-settled rule " that a municipal corporation is not " liable for the negligence of firemen " while engaged in the line of their duty** " (Dillon on Municipal Corporations, sec. 774 ; " Hafford *vs.* New Bedford, 16 Gray, 297 ; Fisher " *vs.* Boston, 104 Mass, 87 ; Jewett *vs.* City of New " Haven, 38 Conn., 368 ; O'Meara *vs.* The Mayor, " 1 Daly, 425)."

> " The exemption from liability in most of the " cases last cited is placed upon the ground that " *the service is performed by the corporation for the " public good in obedience to law in which it has no " particular interest, and from which it derives no " particular benefit in its corporate capacity ; that* " the members of the Fire Department are not the " agents and servants of the city for whose conduct

"it is liable, but act as officers charged with a "public service for whose negligence in the dis- "charge of official duty no action lies against the "City, and a maxim of *respondeat superior* has no "application."

Smith *vs.* City of Rochester, 76 N. Y., 513.

And in a later case, Terhune *vs.* The Mayor, etc., of the City of New York, 88 N. Y., 247, and which was decided long after the union of the City and County of New York, the Court of Appeals held that the Fire Commissioners of the City of New York are public officers, not agents of the City, and that for their acts in wrongfully removing an officer in the Fire Department the City is not liable.

These are all the cases upon the subject in the State of New York, and none of them has ever been questioned or distinguished.

It is, therefore, respectfully submitted that the law of the State of New York to-day is that the City of New York is not responsible for the wrongs of its Fire Department.

POINT VI.

While the fire-boat may, perhaps, be classified as a maritime instrumentality, the result of this collision presents one of those exceptions to holding the City liable under the Maritime Law which is distinctly a requirement of public policy.

Judge Morris, in deciding the case of The F. C. Latrobe, in the 28th Federal Reporter, page 377, while

in that case he held the municipality liable, nevertheless distinctly recognized the fact that where a municipality employs martime instrumentalities, there are exceptions to holding the municipality liable under the general doctrine of the Maritime Law, which exceptions are based on considerations of public policy.

A boat such as the "New Yorker," while capable of being navigated and in that sense being a maritime instrumentality, is nevertheless, built, maintained and navigated for a specific purpose and not for the usual objects for which vessels are built.

If the "Linda Park" had caught fire it would have been the duty of the fire-boats operated by the Fire Department of the City of New York to do all that in them lay to extinguish the fire, nor would they have had any claim whatever for salvage.

It is to be observed that all of the fire-boats owned by the City of New York are constructed, controlled and operated under local laws, which laws have been construed by the highest Court in the State of New York, and this Court has held that, whenever the decisions of a State Court relate to some law of a local character, that the decisions upon that subject are conclusive.

In the case of Detroit *vs.* Osborne, the Supreme Court of the United States, Mr. Justice Brewer delivering the opinion of the Court, said, and quoting from the opinion in the case of Bucher *vs.* The Railroad Company, 125 U. S.:

> "It may be said generally that whenever the
> "decisions of the State Courts relate to some law
> "of a local character which may have become es-
> "tablished by those courts, or has always been a
> "part of the law of the State, that the decisions
> "upon the subject are usually conclusive, and al-

"ways entitled to the highest respect of the Fed-
"eral Courts."

Detroit *vs.* Osborne, 135 U. S., 499.

And to the same effect Burgess *vs.* Seligman, 107 U. S., 20; Clareborn *vs.* Brooks, 111 U. S., 400.

In the case of Haight and another against The Mayor, Aldermen and Commonalty of the City of New York, decided by the learned Judge of the District Court in May, 1885, the general principle now contended for was approved, and the libel in that case dismissed.

In the opinion in that case Mr. Justice Brown said:

"These facts bring the case, so far as I can
"see, entirely within the decision in the case
"of Maximilian *vs.* The Mayor, 62 N. Y., 161, where
"the responsiblity of the Corporation for the neg-
"ligent acts of persons in the employ of the De-
"partment of Charities and Corrections is dis-
"cussed by Folger, *C. J.*, with his usual fullness
"and learning; and the conclusion was there ar-
"rived at, sustained by principle and authority,
"that the corporation could not be held for the
"negligent acts of the employees of that depart-
"ment, because it is an independent board, over
"which the corporation has no control, and which
"does not act for the benefit of the corporation in
"the discharge of any of its corporate functions or
"duties."

Haight *vs.* The Mayor, 24 Fed. Rep., 93.

In the case of Edgerton *vs.* The Mayor, also decided by Mr. Justice Brown, and in which the differences between the liabilities of the City for the acts of the different departments were fully discussed, Mr. Justice Brown says:

"I deem it unnecessary to consider here the "somewhat nice distinctions which have been "made in the several cases decided in the Court "of Appeals in this State as regards the liability "of a city corporation for the negligent acts of the "servants employed under its different heads of "departments, as constituted by law. As respects "negligence by the employees of the Department "of Public Charities and Correction, of the *Fire* "*Department*, and of the Board of Education, it "has been adjudged that the Corporation is not "liable (Maximilian *vs.* Mayor, etc., 62 N. Y., "166; Smith *vs.* City of Rochester, 76 N. Y., 506; "Ham *vs.* Mayor, etc., 70 N. Y., 459). The first "of these cases was followed by this Court in the "case of Haight *vs.* Mayor, etc., 24 Fed. Rep., "93."

Edgerton *vs.* The Mayor, 27 Fed. Rep., 232.

VII.

The writ of certiorari should be quashed or dismissed.

Dated April 1, 1897.

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Counsel to the Corporation,
Proctor for the Mayor, Aldermen and Commonalty of the City of New York, Respondents.

FRANCIS M. SCOTT,
Solicitor for the Mayor, Aldermen and Commonalty of the City of New York.

No. 4-187

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Brief of Connoly for Appts.

[REC'D FEB 1 1899]

Supreme Court of the United States.

Filed April 3, 1899.

THE MAYOR, ALDERMEN AND COMMONALTY OF THE CITY OF NEW YORK AND JAMES A. GALLAGHER,

Appellants,

against

ROBERT W. WORKMAN,

Libellant—Appellee.

Brief in behalf of the Mayor, Aldermen and Commonalty of the City of New York on hearing on Certiorari. (Reargument.)

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Supreme Court of the United States.

THE MAYOR, ALDERMEN AND COMMONALTY OF THE CITY OF NEW YORK and JAMES A. GALLAGHER,

Appellants,

against

ROBERT W. WORKMAN,

Appellee.

Certiorari to the United States Court of Appeals for the Second Circuit.

Brief in behalf of the Mayor, Aldermen and Commonalty of the City of New York on hearing on Certiorari (Reargument).

This is a review by a writ of certiorari by libellant, Robert W. Workman, of the determination of the United States Circuit Court of Appeals for the Second Circuit, which reversed (Record, p. 133) a decree of the District Court for the Southern District of New York, which latter decree had been in favor of the libellant. The facts as disclosed by the record are as follows:

The appeal by appellants to the United States Circuit Court of Appeals was from a decree of the District Court awarding the libellant and appellee the sum of

$815.84 as damages, interest and costs, against the Mayor, Aldermen and Commonalty of the City of New York and against James A. Gallagher, pilot of the fireboat "New York."

On Sunday the 11th day of June, 1893, the barkentine "Linda Park" was lying on the easterly side of Pier 48, East river, and moored a sufficient distance in toward the bulkhead, with her bow pointing toward the river to allow of a schooner's being moored to the same pier with *her* bow *in* toward the bulkhead, allowing a space of some 6 feet between the ends of the respective bowsprits (Record, pp. 9, 38), and alongside of the barkentine "Linda Park" lay a barge with a beam of from 30 to 35 feet (Record, p. 38). On the opposite pier and on the westerly side of Pier 49 was a covered railroad barge with a beam of some 40 feet (Record, p. 39).

By reference to a diagram in the case, the respective dimensions of the piers and bulkhead and the extent of the open water between Piers 48 and 40 will appear as follows: The width of the bulkhead between the piers is shown to be 129 feet and 54 inches; the length of Pier 48 is shown to be 329 feet and 58 inches; and the length of Pier 49 324 feet and 99 inches; and the clear water between the piers at the extreme ends upon the river front 126 feet and 42 inches.

Allowing for the closing of the clear water between the extreme ends of Piers 48 and 49, by the width of the barge at 40 feet, lying practically at the end of Pier 49, alongside the pier, and the width of the schooner lying practically at the extreme end of Pier 48 at 30 feet, the 126 feet and 42 inches of clear water is reduced by 70 feet, leaving 56 feet and 42 inches of clear water between Piers 48 and 49.

Some time between 3 and 4 o'clock Sunday afternoon, June 11, a fire broke out at the corner of Clinton street,

and both the fire-boats "New Yorker" and "Havemeyer" were summoned by telegraph to the scene. At the time the tide was running strong flood, and the "Havemeyer" (known as Engine-Company No. 43) coming down the East river and against the tide, from her station at the foot of Grand street, running in between Piers 48 and 49, made fast to the proper place at the bulkhead, and commenced to play upon the fire (see Record, pp. 54 and 55).

The "New Yorker," a larger and heavier boat, summoned from her station, Pier 1, North river, coming up with the tide and attempting to enter the slip, was caught by the eddy between the piers and swept against the "Linda Park." At the time the "New Yorker" reached the slip, according to the testimony of the libellant's witnesses, the fire had been under way some 20 or 30 minutes and was then blazing (see Record, p. 53, fol. 210).

For the injury done to the barkentine, on the 27th day of July, 1893, a libel was filed against the Mayor Aldermen, and Commonalty of the City of New York as sole respondents. On the 8th day of August, 1893, an answer was interposed by the Mayor, Aldermen and Commonalty, defending both upon the merits and upon the law, upon the ground that they were not responsible for any acts of negligence committed by the servants and employees of the Fire Department (see Record, pp. 3–11).

This case having been on the calendar of the District Court for a number of days and answered "ready," the respondents, the Mayor, Aldermen and Commonalty of the City of New York, on the 9th day of November, 1893, were ordered to show cause why the libel should not be amended by making the Board of Fire Commissioners of the City of New York and the captain of

the fire-boat "New Yorker" parties defendant therein (Record, p. 3).

The motion to amend the libel coming on to be heard before the District Judge on November 10, 1893, the District Judge allowed the amendment prayed for and allowed the respondent to bring in both the Fire Department and the defendant Gallagher, but upon the ground that

> "The authorities cited in the defendants' brief "make it apparently very doubtful whether the "libelant can recover against the City for the "faults of the Fire Department, however clear the "fault of the 'New Yorker' may be" (see Record, page 15).

Upon the order entered upon that decision of December 1, an amended libel was filed against the Mayor, Aldermen and Commonalty of the City of New York, against the Fire Department of the City of New York and James A. Gallagher, the pilot (see Record, p. 17).

On the 12th the defendant Gallagher filed his answer defending upon the merits (see Record, pp. 21-27). The respondent, the Fire Department, excepted to the libel for want of sufficiency, in that the amended libel failed to allege in what capacity the Fire Department of the City of New York was sued, and failed also to allege whether the Fire Department of the City of New York was a corporation, foreign or domestic, and because also there was no negligence charged in the amended libel against the Fire Department (see Record, p. 28).

These exceptions coming on to be heard on the 27th day of December, 1893, the District Court entered an order sustaining certain of the exceptions as therein recited (see Record, p. 29), and thereafter an amendment

to the amended libel was filed (see Record, p. 31), and thereafter the Fire Department answered (see Record, pp. 32–35), and the questions involved were at issue between all the parties of the record.

The case came on to be heard before the Judge of the District Court on the 9th day of April (see Record, p. 36), and thereafter the District Court decreed that the libel be dismissed as against the Fire Department of the City of New York, but rendered a decree against both the Mayor Aldermen and Commonalty of the City of New York and against James A. Gallagher, the pilot.

Upon appeal to the United States Circuit Court of Appeals for the Second Circuit this decree of the District Court was reversed, except as to the provisions thereof relating to the Fire Department of the City of New York, and as to the appellant James A. Gallagher, and as to said James A. Gallagher the decree of said District Court was affirmed with costs.

An application was made to the Circuit Court of Appeals upon petition that the questions in the case be certified to this Court (Record, pp. 135–137). This application was denied, and the case was brought here upon a writ of certiorari (Record, p. 139).

After the argument upon the writ of certiorari this Court made an order that the matter be put back upon the calendar for reargument, and the matter now comes before the Court for such reargument.

POINTS.

I.

There is in the record no evidence upon which to predicate negligence in the pilot of the fire-boat "New Yorker," under the conditions existing at the time of the collision.

Fire-boats, when called upon to serve the purpose for which alone they are constructed, act always under the pressure of a present pressing emergency.

The record shows that when the "New Yorker" reached the scene of her action, a fire was blazing in one of the busiest and most crowded of the business sections of the city.

The fire had then been under headway for some time, and one of the fire-boats—the "Havemeyer"—was playing upon the burning building.

Under these conditions, assuming proof of some act of omission or commission on the part of the pilot, contributing to the collision, it was not in contemplation of law, such negligence as entails a liability to be paid in damages.

It is clear from the record that whatever was done in regard to the navigation of the "New Yorker" was done in the excitement of the moment, and in view of the extent of not only the possible but probable spread of the fire, under pressure of necessity.

These are circumstances in which in admiralty any fault of either omission or commission is held to be an error and not a fault.

The "Grace Girdler," 7 Wallace, p. 201.
The "City of Paris," 9 Wallace, p. 638.

The principle, however, upon which the question of negligence in this case must be determined has very recently been passed upon, both in the State of New York and in the State of Michigan.

In the case of Farley against The Mayor, Farley was the driver of a fire-engine; in going to a fire the fire-engine ran into a truck standing in the street, with the result that Farley was seriously injured. It was proven on the trial that Farley was driving at a rate of speed *forbidden by law*. Held by the lower courts to establish contributory negligence on the part of the plaintiff, to defeat a recovery.

The Court of Appeals, however, held:

> "It is manifest that section 1932 of the Consolidation Act can have no application to the speed at which engines or hose-carts connected with the Fire Department shall be driven *when going to a fire*. This section is not in the chapter regulating the Fire Department. By another section the vehicles of the Fire Department are given the 'right of way' at any fire over all other vehicles except those carrying the United States mail (section 444). The safety of property and the protection of life may and often do depend upon celerity of movement, and require that the greatest practicable speed should be permitted to the vehicles of the Fire Department *in going to fires*. Section 1932 was intended to regulate the speed of horses traveling on the streets and using them for the ordinary purposes of travel, and from the nature of the exigency cannot apply to the speed of vehicles of the Fire Department on their way to fires."

Farley *vs.* The Mayor, etc., 152 N. Y., 227.

And the same principle was applied in

Coots *vs.* The City of Detroit, 75 Mich., 628.

Plainly a rate of speed entirely proper and necessary in going to a fire might and plainly would be improper in coming from a fire, so that no responsibility for damage would follow from injuries arising from an excessive speed in one case where the liability would plainly attach in the other.

The learned Judge in the District Court recognizes the principle, saying:

> "I have no doubt that some acts which might
> " properly be deemed negligent under ordinary
> " circumstances ought not be held negligent under
> " the stress of fires. But the same general rule is,
> " I think, nevertheless to be applied as the test of
> " what is due care, viz., the care that a man of
> " ordinary prudence would be reasonably supposed
> " to exercise under like circumstances, if the burn-
> " ing property, and the property damaged had been
> " his own.

Record, pp. 105, 106.

It is not disputed that it was the business of the pilot of the fire-boat "New Yorker" to reach the scene of the fire and bring his engines into play at the earliest possible moment. The only suggestion on the part of the libellant as to the course that he ought to have taken is found in the testimony of Allison Briggs, who gave it as his opinion that the proper course would have been to "warp in."

Record, p. 99.

II.

The Mayor, Aldermen and Commonalty of the City of New York are not liable to an action for damages on account of the negligence of the officers or employees appointed or employed by the Commissioners of the Fire Department in the performance of their public duties.

This exemption from liability springs from the nature of the duty performed by the officers and members of the Fire Department.

The extinguishment of fires is undertaken as a public or governmental duty, imposed for the public or general benefit, and from which the Corporation derives no corporate benefit or emolument.

The distinction between the powers and duties of municipal corporations from which corporate emolument is derived and those functions which are purely governmental, performed for the public good, from which no benefit or revenue comes to the Corporation, is made the test of liability for the consequence of neglect on the part of the agents necessarily employed by the Corporation.

In Dillon on Municipal Corporations (vol. 1, p. 107, 4th ed.), it is said, concerning municipal corporations, that they "possess a double character; the one gov-"ernmental, legislative, or public; the other in a sense "proprietary or private.

"The distinction between these, though sometimes "difficult to trace, is highly important and is frequently "referred to, particularly in the cases relating to the "implied or common-law liability of municipal cor-"porations for the negligence of their servants, agents,

"or officers in the execution of corporate duties and "powers."

Dillon on Municipal Corporations, 4th ed., vol. 2, page 1180, section 966, further says that municipal corporations are "considered to be impliedly liable "(unless the legislation negatives such liability) for "wrongful acts done in what is termed their private "or corporate character from which they derive some "special or immediate advantage or emolument, but "not as to such acts done in their public capacity as "governing agencies in the discharge of duties "imposed for the public or general (not corporate) "benefit."

The following cases are cited in support of the doctrine thus defined:

Oliver *vs.* Worcester, 102 Mass., 489.
Richmond *vs.* Long's Adm., 17 Gratt., 375.
Petersburg *vs.* Applegarth, 28 Gratt., 321.
Western Savings Fund Society, *vs.* Philadelphia, 31 Pa. St., 175, 189.
Bailey *vs.* The Mayor, 3 Hill, 531.
Maximilian *vs.* The Mayor, 62 N. Y., 160.

The following is quoted from Oliver *vs.* Worcester, 102 Mass., 489:

> "The distinction is well established between the "responsibilities of towns and cities for acts done "in their public capacity in the discharge of duties "imposed on them by the Legislature for the pub-"lic benefit, and for acts done in what may be "called their private character, in the management "of property and rights voluntarily held by them "for their own profit and advantage as a corpora-"tion, although inuring ultimately to the benefit "of the public."

In Bailey *vs.* The Mayor, 3 Hill, 531, the distinction between the public and private capacity of municipal corporations is maintained by Chief Justice Nelson. He says, in relation to municipal powers:

> "If granted for public purposes exclusively they "belong to the corporate body in its public politi- "cal or municipal character. But if the grant was "for the purposes of private advantage and emolu- "ment, though the public may derive a common "benefit therefrom, the corporation, *quoad hoc*, is "to be regarded as a private company."

And from such considerations the question of liability in the case was determined.

In the same case, 2 Denio, 433, the same distinction between governmental duties exercised for public benefit, and the duties through which the corporation derives benefit for itself is maintained, and the exemption contended for in the case at bar recognized, as follows:

> "On the other hand, where such corporation is "bound to appoint an officer for the performance "of a public duty it is not liable" (p. 446).

In Maximilian *vs.* The Mayor, 62 N. Y. Rep., the Court of Appeals say:

> "There are two kinds of duties which are im- "posed upon a municipal corporation: One is of "that kind which arises from the grant of a "special power, in the exercise of which the "municipality is as a legal individual; the other "is of that kind which arises, or is implied, from "the use of political rights under the general law, "in the exercise of which it is as a sovereign. The "former power is private, and is used for private "purposes; the latter is public and is used for

" public purposes (Lloyd *vs.* The Mayor, 5 N. Y.,
" 374). The former is not held by the munici-
" pality as one of the political divisions of the
" State; the latter is. In the exercise of the for-
" mer power, and under the duty to the public
" which the acceptance and use of the power in-
" volves, a municipality is like a private corpora-
" tion, and is liable for a failure to use its power
" well, or for an injury caused by using it badly.
" But where the power is intrusted to it as one of
" the political divisions of the State, and is con-
" ferred, not for the *immediate* benefit of the mu-
" nicipality, but as a means to the exercise of the
" sovereign power for the benefit of all citizens, the
" corporation is not liable for nonuser, nor for
" misuser by the public agents (Eastman *vs.*
" Meredith, 35 N. H., 284).

" Where the duties which are imposed upon
" municipalities are of the latter class, they are
" generally to be performed by officers who,
" though deriving their appointment from the
" corporation itself, through the nomination of
" some of its executive agents, by a power de-
" volved thereon as a convenient mode of exer-
" cising a function of government, are yet the
" officers, and hence the servants, of the public
" at large. They have powers and perform duties
" for the benefit of all the citizens, and are not
" under the control of the municipality, which has
" no benefit, in its corporate capacity, from the per-
" formance thereof. They are not then the agents
" or servants of the municipal corporation, but
" are public officers, agents or servants of the
" public at large, and the corporation is not re-
" sponsible for their acts or omissions, nor for the
" acts or omissions of the subordinates by them
" appointed (Fisher *vs.* Boston, 104 Mass., 87).

"And where a municipal corporation elects or "appoints an officer, in obedience to an act of the "Legislature, to perform a public service, in which "the corporation has no private interest, and from "which it derives no special benefit or advantage "in its corporate capacity such officer cannot be "regarded as a servant or agent of the municipality, *for whose negligence or want of skill it can "be held liable.*"

"It has appointed or elected him, in pursuance "of a duty laid upon it by law, for the general "welfare of the inhabitants or of the community."

In the same case the Court further says:

"Where it (the City) authorizes a use of its corporate property which use itself makes that "property harmful to others, it is liable. Such is "understood to be one of the grounds on which "went Bailey *vs.* The Mayor (2 Denio, 433). And "the duty of keeping in repair streets, bridges, and "other common ways of passage, and sewers, and "a liability for a neglect to perform that duty rests "upon an express or implied acceptance of the "power and an agreement so to do. It is a duty "with which the City is charged for its own corporate benefit, to be performed by its own agents "as its own corporate act (Conrad *vs.* Trustees of "Ithaca, 16 N. Y., 158). It is not always easy to "say within which class a particular case should "be placed. But when it is determined that the "power and duty are given and taken for the benefit of the corporation as a corporate body "and the act to be done is to be done by it "through agents of its appointment and under "its control and power of removal, there is no "doubt of its liability for negligent omission or "negligent attempt at performance. When the

" powers created and duly enjoined are given, and
" laid upon officers to be named by the corporation,
" but for the public benefit and as a convenient
" method of exercising a function of general gov-
" ernment, and the corporation has no immediate
" control nor immediate power of removal of those
" officers, nor of their subordinates and servants,
" then it is not liable for their negligent omission
" or action."

The doctrine of Maximilian *vs.* The Mayor has been repeatedly reaffirmed and enforced by the Court of Appeals of the State of New York in subsequent cases.

In Bieling *vs.* The City of Brooklyn, 120 N. Y. Rep., p. 98, where there was a recovery for damages sustained in consequence of the fall of a wooden awning in a street of the city, the Court says:

" The municipality can perform its functions
" only through officers or agencies. For the dis-
" charge of those powers of a governmental or
" political character, which are vested by the
" statute in officers, and those duties not placed
" upon it but upon officers or departments created
" and vested with powers for public purposes, as
" distinguished from those for the purposes of the
" corporation, it is not responsible for their mis-
" conduct or neglect, to individuals suffering dam-
" ages as the result of it (Lloyd *vs.* Mayor, etc., 5
" N. Y., 374; Maximilian *vs.* Mayor, etc., 62 *id.*,
" 160; Ham *vs.* Mayor, etc., 70 *id.*, 459; Smith *vs.*
" City of Rochester, 76 *id.*, 506)."

" There are various duties which are legitimately
" those of the corporation, amongst which is that
" of taking care of the streets within it. To keep
" them in safe condition for public use was a
" primary duty resting upon the City of Brooklyn."

The same principle has been adjudicated in other States.

In Mead *vs.* New Haven, 40 Conn., 72, where a city, under power given by its charter, appointed an inspector of steam boilers within the city, and by by-law imposed a penalty on any person who should use such a boiler without having it tested by the inspector, it was held that the city was not liable for negligence of the inspector in the discharge of his duty.

The Court says:

> "The duty of inspection of boilers is governmental. The object of the inspection is to protect all citizens from danger, who may come in contact with the boiler, or may be exposed in any way to danger from its unsafe condition. The City, as such, has no pecuniary or individual or private interest in the matter, and although the power of the City over the subject is conferred by the charter, and not by the general law, yet the City must, we think, be regarded as the agent of the government, and, acting for the State, and not for itself, in making the appointment of inspectors, and therefore not liable for the inspector's negligence."

See also—

Brown *vs.* Vinalhaven, 65 Maine, 402.
Mitchell *vs.* Rockland, 52 Maine, 118.

III.

The doctrine of Maximilian vs. The Mayor, 62 N. Y., 160, has not been modified or limited in the State of New York.

It seemed to have been contended by libellant on the former argument herein that the case of Hill *vs.* The Mayor, 139 N. Y., 495, has in some way limited the general doctrine of Maximilian *vs.* The Mayor, 62 N. Y., 160, contended for by the City of New York in this case.

An examination, however, of the case of Hill *vs.* The Mayor will show that it has no such effect.

That was an action brought to compel the removal of a structure erected by the City of New York on a pier in that city, and used by the Street Cleaning Department for dumping ashes, etc.

In other words, the action was one to restrain the continuance of the nuisance.

The first paragraph of the head-note correctly sets forth the point decided by the Court of Appeals in the Hill case, so far as the same is applicable to the present one.

> "The rule that a municipal corporation, engaged in the performance of a public duty upon which the public health and comfort depends, and acting under authority of the Legislature, is not liable for consequential damages to others, even though its act amounted to a nuisance as between individuals, has this limitation: the authority must be express or a clear and unquestionable implication from powers conferred; it must be certain and unambiguous, and such as to show that the Legislature must have contemplated the very act in question."

And the Court examined the statute and held that there was no authority thereunder for the City, through its department, doing the act complained of.

In a somewhat later case the Court of Appeals, in speaking of the Hill case, and other similar ones, said:

> "These cases have grafted upon the principle "contended for in behalf of the defendant that "legal liability and damages cannot result from "acts done by a corporation in the performance of "a public duty by express legislative authority re- "sulting in consequential injury to others, and "which, as between individuals, will be regarded "as a nuisance, an important limitation. It is that "the authority that will shelter *an actual nuisance* "must be express, or a clear and unquestionable "implication from powers conferred certain and "unambiguous such as to show that the Legisla- "ture must have intended and contemplated the "doing of the very act in question (Hill *vs.* Mayor, "etc., 139 N. Y., 495; Bohan *vs.* Port Jervis Gas- "light Co., 122 *id.*, 18; Cogswell *vs.* N. Y., N. H. "& Hartf. R. R. Co., 103 *id.*, 10)."
>
> Morton *vs.* Mayor, 140 N. Y., 212.

It will be seen from this that both the Hill and Morton cases were cases of the maintenance of *an actual nuisance.*

It is more than doubtful that the City is liable even for the negligence of the Street Cleaning Department, or for that of a department performing corresponding functions.

This question has been decided in the negative in Love *vs.* Atlanta, 95 Ga. 129, and Connelly *vs.* Mayor (Tenn.), 46 S. W. Rep., 565, in which cases Boards of Health, performing duties imposed under the New York statutes upon the Street Cleaning Department, were held not liable for negligence.

And the precise point of the liability of a city for the negligence of a street-cleaning department while engaged in removing ashes and garbage was decided in Condict *vs.* Jersey City, 46 N. J. L., 157, in which it was held that the City was not liable therefor.

There is no decision in this country, so far as counsel is aware, holding a city liable for the negligence of a street-cleaning department engaged in removing ashes and garbage, except the unreported case of Quill *vs.* The Mayor, decided by the Appellate Division of the Second Department in the State of New York upon the special ground that the duty of keeping their premises clear of ashes and garbage is imposed primarily upon the householders, and not upon the City, and the Court said:

> "The burden of removing the ashes, if the "owner does not wish them to remain longer "upon his property, is primarily just as much his "obligation as it was to bring to his premises in "the first instance the coal from the burning of "which the ashes proceeded. * * * Indeed "the distinguishing feature which characterizes "such services as municipal *is that they are pri-* "*marily the work of individual citizens.*"

Whether this case (which is now on appeal) is good or bad law it does not affect the precise question in the present case, because there is no likeness between the duty of removing ashes and garbage from the streets of a city and from private premises and the duty imposed by the State upon a municipality of extinguishing fires.

There is surely no private duty at all in the latter case.

It is simply a governmental function imposed on the City by the State.

The conclusion reached in the case of Bailey *vs.* The Mayor, 3 Hill, 531—a case sometimes cited in this class of cases—was simply that a municipal coporation *in its private character* as the owner of lands, etc., is to be regarded in the same light as an individual and dealt with accordingly, and that the powers granted by an act of 1834 to provide for supplying the City of New York with pure and wholesome water was intended for the private advantage and emolument of the City, the State, in its sovereign capacity, having no interest in them.

This case evidently does not apply to the present one, and, even in the State of New York, has been overruled.

See—

Darlington *vs.* The Mayor, 31 N. Y., 164.
Fire Insurance Co. *vs.* Village of Keeseville, 154 N. Y., 54.

The attention of the Court is earnestly called to the case last mentioned as being a reiteration on somewhat different facts of the fundamental distinction drawn in the Maximilian case, which latter case has also been since followed in two late cases—Hughes *vs.* County of Monroe, 147 N. Y., 49, and Markey *vs.* County of Queens, 154 N. Y., 675—without the slightest indication or desire on the part of the Court of Appeals to in any way limit its doctrine.

It is submitted, therefore, that none of the cases referred to in any way qualify the doctrine of Maximilian *vs.* The Mayor, *supra*, upon which the City of New York in this case relies.

IV.

This exemption from liability growing out of the nature of the duties performed is recognized and enforced, even when the duties are defined, and the executive officers created to perform the same by provisions in the charter, or organic act creating the municipal corporation, as well as when the duties are imposed upon corporate officers by independent statutes.

In Maxmilian *vs.* Mayor, the servant by whose negligence the plaintiff was injured, was appointed by the Commissioners of Charities and Correction, corporate officers, to whom was intrusted the execution of the laws in relation to the relief of the poor sustained in the almshouses and hospitals, and in relation to criminals in custody in the public prisons.

Such Commissioners were, in the first instance, invested with power by an independent act, chapter 510 of the Laws of 1860, page 1026.

At the time of the occurrence by which the plaintiff was injured, the Commissioners of Charities and Correction had become a department of the City Government, under and pursuant to section 80, chapter 137 of the Laws of 1870, the City Charter, provided for, as such department, by specific provisions in the Charter of the City, authorized to exercise all the powers and duties defined by the Act of 1860.

The Court notices the creation of the Commissioners by the Act of 1860 and subsequent transformation into a department of the City Government, as follows:

> "By this act (the Act of 1860) that department
> "is created in the City and County of New York,

"and it is declared that there shall be chief officers "thereof, and their name of office is designated "(sec. 1). They thereby have their appointment "from the Comptroller of the City and County, "though since then they are made a department of "the City and appointable by the Mayor (Laws of "1870, chap. 137, p. 366, sections 29-30; p. 386, "sec. 80).

The Court further say:

"The Commissioners of Charities and Correc- "tion are public officers, though getting their right "of office from a circumscribed locality; and the "acts which they may do are to be done in their "capacity as public officers, in the discharge of "duties laid upon them by the law for the public "benefit, and far removed from acts done by city "or town, in its municipal character, in the man- "agement of its property for its own profit or "advantage. It is seen at once that the powers "and duties of the Commissioners of Charities and "Correction are not to be exercised and performed "for the especial benefit of the defendant (the City "of New York). It gets no emolument therefrom, "nor any good as a corporation. It is the public, "or individuals as members of the community, "who are interested in the due exercise of these "powers and the proper performance of their "duties."

The analogy between the duties of the Commissioners of Charities and Correction and of the Fire Commissioners, as to the public, governmental character thereof, is complete; and the Fire Department, although an executive department of the City Government, still performs duties which pertain not to the emolument of the Corporation or its special benefit, and which pertain only to the public good and the performance of a public duty.

The Fire Department originated also by a system of laws similar to the laws by which the Department of Charities and Correction was created.

Prior to 1865 the extinguishment of fires was undertaken by volunteer associations, to which the municipality furnished apparatus, and by ordinances regulated, in some respects, the government thereof.

For the acts or negligence of such associations, their officers or members, when engaged in extinguishing fires, the Courts held that the Corporation was not liable.

O'Meara *vs.* The Mayor, 1 Daly, 425.

By chapter 249 of the Laws of 1865, page 395, the Metropolitan Fire District was established; the appointment of Commissioners provided for; an elaborate provision made for the government and discipline of the officers and members thereof; the duties defined, and provision made for the payment to the officers and members for services performed.

Subsequently by section 30, chapter 137, Laws of 1870, being the City Charter, a Fire Department was created in the City Government, and by section 1 of the same act, as amended by section 16 of chapter 574, Laws of 1871, the Municipal Fire Department was constituted, consisting of a board of five persons authorized to perform all the duties prescribed by the Act of 1865, in relation to the extinguishment of fires.

The Fire Department thus became a charter department, empowered and authorized to execute the State law in respect to a duty in which the City has no pecuniary or private interest, and in which the department is still to be regarded as the agent of the State Government, acting for the State in executing governmental power for the public and not for the corporate benefit.

The educational establishment of the City is another instance of a department created within the City Government, authorized to discharge duties not local or corporate, but related to and belonging to the administration of the State Government; which, although formally a department of the Municipal Government, is still, by the decision of the Court of Appeals, recognized as an administrative branch of the State Government, for which the City is not liable in damages in respect to negligence of an employee of the department.

Ham *vs.* The Mayor, 70 N. Y. Rep., 459.

It therefore may be considered to be the established doctrine, that if the nature of the duty performed is governmental and not corporate, the City is exempt from liability for the negligence of an officer, agent or servant appointed by it to execute such duty, even when the duty is cast upon a department or officer of the municipality, by specific provisions in the corporate charter.

V.

The duties of a Fire Department are governmental and not corporate, and consequently of the class upon which corporate liability for the negligence of the officers or servants employed therein cannot be predicated.

It is said in Dillon on Municipal Corporations, above quoted, that the distinction between corporate and governmental duties is well established, though difficult to trace. It is therefore proper to refer to the

concrete cases in which the Courts have defined the distinction.

(*a*) It is well settled that the caring for public streets, keeping them in order for safe and convenient use, regulating, grading and paving them, is deemed to be a duty assumed by the corporation, in consideration of the privileges granted by its charter, performed for its corporate advantage, and therefore that liability in damages is cast upon the corporation, in case of negligence on the part of its officers, agents or servants in respect to the performance of such duties.

Maximilian *vs.* The Mayor, *supra.*
Bieling *vs.* City of Brooklyn, 120 N. Y. Rep., 106.
Ehrgott *vs.* The Mayor, 96 N. Y.
Rehberg *vs.* The Mayor, 91 N. Y. Rep., 144.
Hume *vs.* The Mayor, 74 N. Y. Rep., 264.

The duties performed by the Commissioners of Charities and Correction in support of the poor, and the confinement of prisoners under criminal charges, and the performance of duties connected with the maintenance of the school system have been distinctly defined by the Court as falling within the class of governmental duties performed for the public and not corporate benefit, and no liability for negligence on the part of the officers, agents or servants employed therein is imputed.

Maximilian *vs.* The Mayor, 62 N. Y. Rep., 162.
Ham *vs.* The Mayor, 70 N. Y. Rep., 459.

In respect to the extinguishment of fires, the decisions of the Courts in all the States agree in including that duty among the governmental functions performed by municipal corporations in behalf of the public, as to

which the corporation is exempt from liability in damages for neglect of the officers, agents or servants employed therein.

In the American and English Encyclopædia of Law, volume 7, page 997, it is said:

> "The members of the Fire Department of a mu-
> " nicipality are public officers, and not the mere
> " servants of the municipality; and, in the ab-
> " sence of an express statute, the municipal cor-
> " poration is not liable for injuries occasioned by
> " the negligence of the members of its Fire De-
> " partment in performing their duties."

And this doctrine is supported by numerous cases cited.

The text-books are emphatic and clear on the subject, and maintain the same doctrine.

Judge Dillon's well-known work has already been referred to.

In the latest book on the subject it is said:

> "Municipal corporations are not liable for the
> " negligence of their firemen—although they may
> " be appointed and removed by the City, and the
> " performance of duties are wholly subject to its
> " control."
>
> Tiedeman on Municipal Corporations, sec. 333*a*.

And another very recent work also says:

> "Members of a Fire Department, as officers
> " charged with a public service, are not the agents
> " or servants of the city which appoints them, and
> " the city is therefore not liable for their negligent
> " discharge of official duty, nor is it liable for neg-

" ligence in the performance of a public duty im-
" posed by law upon its members.

1 Beach on Public Corporations, sec. 744. And see also Jones on Negligence of Municipal Corporations, sec. 31.

After a careful search of the authorities, and after throwing aside a great number of decisions which relate to failure to supply water, and which, although bearing on the question, are not absolutely in point, the following authorities will be found to sustain, without exception and under the varying circumstances therein discussed, the doctrine of the non-liability of a municipal corporation for the acts of its fire department.

And the attention of the Court is most earnestly called to the fact already pointed out, that in the decisions no distinction whatever is drawn between fire departments organized by a distinct and separate law of the State, and fire departments which are organized under a city charter, or which by the wording of the statutes creating them, form an integral part of the administration of the City Government, although not specifically named in the City Charter.

The following are the principal cases, with a short memorandum of the facts under which they arose:

Hafford *vs.* New Bedford, 16 Gray, 297 (hose-carriage on way to fire running over person).

Fisher *vs.* Boston, 104 Mass., 87 (injuries from bursting hose).

Burrill *vs.* Augusta, 78 Me., 118 (frightening horse by escaping steam from engine left in street).

Wild *vs.* Patterson, 47 N. J. Law, 406 (injury arising from defect in brake of engine).

Hayes *vs.* Oshkosh, 33 Wis., 314, (fire caused by negligent management of engine, allowing escape of sparks, etc).

Kies *vs.* Erie City, 135 Pa. St., 144 (negligent arrangement of engine-house doors).

Wilcox *vs.* City of Chicago, 107 Ill., 334 (collision with hook-and-ladder wagon).

Edgerly *vs.* Concord, 59 N. H., 78 (negligent testing of hydrant).

Howard *vs.* San Francisco, 51 Cal., 52 (collision with engine).

McKenna *vs.* St. Louis, 6 Mo. App., 320 (negligent running of hose-carriage).

Jewett *vs.* New Haven, 38 Conn., 368 (negligent driving of hose-carriage).

Heller *vs.* Sedalia, 53 Mo., 159 (want of proper exertions to extinguish fire).

Grube *vs.* St Paul, 34 Minn., 402 (careless driving of hose-carriage).

Wheeler *vs.* Cincinnati, 19 Ohio St., 19 (insufficient water and insufficient efforts to extinguish fire).

Brinkmeyer *vs.* Evansville, 29 Ind., 187 (insufficient water and engines out of repair).

Robinson *vs.* Evansville, 87 Ind., 334 (hose insufficient in length to reach fire).

Welsh *vs.* Rutland, 56 Vt., 228 (slipping on ice arising from water escaping from a fire-hydrant).

Greenwood *vs.* Louisville, 13 Bush, 226 Ky. (engine negligently running over person on sidewalk).

Freeman *vs.* Philadelphia, 7 W. N. C., Pa., 45 (injuries from careless driving of engine).

Knight *vs.* Philadelphia, 15 W. N. C. Pa., 307 (injuries from careless driving of fire-engine).

Dodge *vs.* Granger, 17 R. I., 664; 24 Atl. Rep., 100 (negligent projection of ladder from engine-house).

Lawson *vs.* City of Seattle, 6 Wash., 184; 33 Pac. Rep., 347 (defective brace).

Gillespie *vs.* City of Lincoln, 35 Neb., 34; 52 N. W. Rep., 811 (killing by ladder-wagon).

Simon *vs.* Atlanta, 67 Ga., 618 (collision with rope stretched across street by municipality to allow parade of Fire Department).

In Hafford *vs.* New Bedford, 16 Gray, 297, already cited, it is said:

> "The members of the Fire Department of New "Bedford, when acting in the discharge of their "duties, are not servants or agents in the employ- "ment of the city, for whose conduct the city can "be held liable; but they act rather as officers of "the city, charged with the performance of a cer- "tain public duty or service, and no action will "lie against the city for their negligence or im- "proper conduct while acting in the discharge of "their official duty."

In this case the members of the Fire Department were acting under a law which had been accepted by a popular vote of the citizens, and made a part of the organic law of the city, and the officers and members were paid from the City treasury for their services.

In Fisher *vs.* Boston, 104 Mass., 87, the city was held not to be liable for a personal injury to the plaintiff caused by the bursting of a hose attached to a fire engine.

The Court say :

> "It makes no difference whether the Legislature "itself prescribes the duties of the officers "charged with the repair and management of fire-"engines, or delegates to the city or town, the "definition of those duties by ordinance or by-"law. However appointed or elected, such per-"sons are public officers, who perform duties im-"posed by the law for the benefit of all the citizens "the performance of which the city or town has "no control over, and derives no benefit from, in "its corporate capacity. The acts of such public "officers are their own official acts, and not the "acts of the municipal corporation or its agents."

In Jewett *vs.* New Haven, 38 Conn., 368, where the plaintiff was negligently run into and injured by the driver of a hose-cart, a member of the Fire Department, who was hastening to the engine-house to procure additional hose for use at a fire; held, that the members of the Fire Department, when engaged in extinguishing fires, are performing a public, governmental act for the general good, and cannot be regarded as servants of the city, for whose negligence it can be held liable.

The Fire Department in this case was a paid fire department, organized under a law accepted by a popular vote of the citizens of the city, and made a part of the organic law of the municipality.

The quotation from the opinion of Chief Justice Butler, inserted by the learned Trial Judge in his opinion in the case at bar, is a quotation from a dissenting opinion, and while doubtless quoted by the

Court Justice below as well expounding Judge Butler's views, yet defines the doctrine which was condemned by the decision in the case.

In Knight *vs.* Philadelphia, 15 W. N. C. (Pa.) 307, the Court says:

> "The members of the Fire Department are not "such servants of the Municipal Corporation as "to make it liable for their acts of negligence. "Their duties are of a public character and for a "high order of public benefit. The fact that the "act of Assembly did not make it obligatory on "the City to organize a Fire Department, does not "change the legal liability of the municipality for "the conduct of the members of the organization. "The same reason which exempts the City from "liability for the acts of its policemen applies "with equal force to the acts of its firemen."

In O'Meara *vs.* The Mayor, 1 Daly, 425, the Court says:

> "The powers exercised by the defendants in re- "ference to the Fire Department, are conferred "and employed exclusively for the public benefit, "not for purposes of private advantage and emol- "ument, and this is an answer to the plaintiff's "claim."

The definition of the Court in relation to the nature of the powers exercised by those who extinguish fires as officers of the Fire Department, is equally applicable to the department, organized under the present laws, as it was to the volunteer department, which was organized, sustained, and supplied by the City, at the time when the last-mentioned case was decided.

VI.

The contention of the defendants in this case does not controvert the doctrine laid down in Barnes vs. The City of Columbia, 91 U. S. Rep., 530.

The action in that case was brought to recover for damages sustained by the plaintiff in consequence of falling into an excavation in the street, negligently left there by the Commissioners authorized to improve the streets.

The duty performed by the Commissioners, in behalf of the municipality, was the duty of caring for streets, which, in all the cases in this State, and all other States, is held to be a duty performed for the corporate benefit, as to which a liability in damages arises, if the officers charged with executive powers in respect thereto are negligent in the performance of their duty.

The duty which was performed by the Commissioners was a corporate duty, distinguishable from the governmental duty of extinguishing fires, which is performed for the public, and not for the corporate advantage and benefit.

Respondents argue, therefore, that the foregoing authorities and the principles thereby illustrated sustains the following proposition:

1st. That the municipal corporation, through the Fire Department, exercises powers which are purely governmental, for the public benefit; from which it derives no revenue or emolument as a corporation; therefore, that it is not liable for the consequence of the neglect of an agent necessarily employed by it, in the absence of express statute creating such liability.

The position of the defendants in relation to the performance of the duty of extinguishing fires, and its relation to the public, is clearly illustrated by the case of Murphy *vs.* The Commissioners of Emigration, 28 N. Y. Rep., 142.

The Commissioners of Emigration were public governmental agents, exercising their powers for the public good and not for their individual advantage or emolument.

They were sued for the value of property lost by the neglect of their agents.

It was argued in their defense that they were representatives of the Government transacting public business through agents; that the government, and consequently the Commissioners, is not liable for the neglect of the agents if necessarily employed in transacting public business.

Citing—

Story on Agency, sec. 319.
Story on Bailment, sec. 462.
Seymour *vs.* Van Slyck, 8 Wendell, 403 422.
United States *vs.* Kirkpatrick, 9 Wheaton, 435.
Whitfield *vs.* Lord de Spencer, Cowp., 342.

And the Court in its opinion in this case of Murphy *vs.* Commissioners of Emigration, *supra*, said:

> "The position of the defendants is distinguish-
> "able from that of persons acting for their own
> "benefit or employing others for their own benefit.
> "They do not act for their own benefit or employ
> "agents, clerks or servants for their own benefit,
> "but for the benefit of the community at large."

Story on Agency, section 319, says:

"The doctrine is now firmly established that "public officers and agents are not responsible for "the misfeasance or positive wrongs, or for the "nonfeasance or negligences of the servants and "other persons properly employed by and under "them, in the discharge of their special duties."

Upon the same principle, an action does not lie against the Postmaster-General for property lost in course of transmission through the mail.

Whitfield *vs.* Lord De Spencer, Cowp., 342.

The controversy in the case at bar is altogether similar to the contention that the City is liable for the negligence or neglect of policemen employed by it in the preservation of the public peace.

That such liability does not exist is well settled.

McKay *vs.* City of Buffalo, 9 Hun, 401; affirmed 74 N. Y. Rep., 619.

Nor is the City liable for the acts of its Board of Health.

Bamber *vs.* City of Rochester, 26 Hun, 587.

The doctrine of exemption from liability of municipal corporations for the neglect of police officers is now fixed beyond controversy; the similarity in the nature of the duty performed by policemen and by firemen is obvious; and that both perform governmental functions is obvious; and the principle which exempts the municipal corporation by which both policemen and firemen are appointed or employed, is equally applicable as to both policemen and firemen.

VII.

The law, as laid down by the Courts of the State of New York, is positive and clear.

As has already been suggested hereinbefore, the decisions of the various States cited draw no distinction between liability for the acts of a fire department organized under a city charter and fire departments organized under separate and special acts, but performing their functions within a specific area.

This is important in view of the evident stress laid by the trial Judge below upon the supposed distinction in the decisions of the State of New York between the powers of the New York City Fire Department as organized prior to, and as existing after the department became by statute a part of the administration of the City Government.

The first case in the State has been already mentioned--O'Meara *vs.* The Mayor, 1 Daly, 425.

That case was decided under the law relating to the old Fire Department, and was before the union of the City and County of New York.

But the Court said that the members of the Fire Department of this City owe their allegiance to the City, not as members of a corporation, but as members of an organization identified with the administration of the City Government and forming a part of its protective police; that the powers exercised by the City Corporation in reference to the Fire Department are conferred and employed exclusively for the public benefit, and the Corporation cannot be held liable as a master for the wrongful acts of firemen.

The Court said, in reference to the duties of the firemen:

> "They are for the pecuniary benefit of the in-
> "habitants of the city as well as for their personal
> "safety. They result in no benefit or advantage
> "to the defendants other than to individuals, and
> "then only when a loss or disaster is averted by
> "their efforts. The powers exercised, therefore,
> "by the defendants in reference to the fire depart-
> "ment are conferred and employed exclusively
> "for the public benefit, not for purposes of private
> "advantage or emolument, and this is the answer
> "to the plaintiff's claim (The Mayor, etc., *vs.*
> "Bailey, 2 Denio, 433; Lloyd *vs.* The Mayor, etc.,
> "5 N. Y., 369; Griffin *vs.* The Mayor, etc., 9 N.
> "Y., 456)."

In 1875 it was held that the City was not liable for the acts of the Metropolitan Fire Department, and the Court, after showing by its citation of authorities that it did not regard the fact as to whether or not the department was created under the City Charter one of importance, said:

> "In the management of the property and appa-
> "ratus and in their acts put forth in the extin-
> "guishment of fires, the firemen act not for the
> "city corporation, but for the general public."
>
> Woolbridge *vs.* The Mayor, 49 How. Pr., 67.

And a much later case decided under the present Consolidation Act (L. 1882, ch. 410), that is to say, *under the law as it stands to-day* also held that *the present corporation* was not liable for the negligent action of the employees of the Fire Department while engaged in testing a fire tower prior to its purchase by the City for use in the said department.

This case was Thompson *vs.* The Mayor, 52 Super., 427, a case decided by the General Term of the Superior Court in 1885.

This case last cited is exactly in point.

In the Court of Appeals also, while there the exact question here under discussion has never been squarely passed upon, yet in a decision which has become a leading case as to *ultra vires* of municipal corporations (Smith *vs.* City of Rochester, 76 N. Y., 506), after stating that the Common Council of Rochester exceeded its powers in ordering a midnight parade of the Fire Department for the celebration of the Centennial, the Court added :

> "Assuming, however, that the Common Council, " in making an order for a midnight parade of the " fire department to celebrate the centennial anni- " versary of the nation, had authority under the " provisions, last cited, the difficulty in maintaining " the plaintiff's action is **the well-settled rule " that a municipal corporation is not " liable for the negligence of firemen " while engaged in the line of their duty** " (Dillon on Municipal Corporations, sec. 774; " Hafford *vs.* New Bedford, 16 Gray, 279 ; Fisher " *vs.* Boston, 104 Mass., 87 ; Jewett *vs.* City of New " Haven, 38 Conn., 368 ; O'Meara *vs.* The Mayor, " 1 Daly, 425)."

> "The exemption from liability in most of the " cases last cited is placed upon the ground that " *the service is performed by the corporation for the " public good in obedience to law in which it has no " particular interest, and from which it derives no " particular benefit in its corporate capacity ; that* " the members of the Fire Department are not the " agents and servants of the city for whose conduct

"it is liable, but act as officers charged with a "public service for whose negligence in the dis- "charge of official duty no action lies against the "City, and a maxim of *respondeat superior* has no "application."

Smith *vs.* City of Rochester, 76 N. Y., 513.

And in a later case, Terhune *vs.* The Mayor, etc., of the City of New York, 88 N. Y., 247, and which was decided long after the union of the City and County of New York, the Court of Appeals held that the Fire Commissioners of the City of New York are public officers, not agents of the City, and that for their acts in wrongfully removing an officer in the Fire Department the City is not liable.

These are all the cases upon the subject in the State of New York, and none of them has ever been questioned or distinguished.

It is, therefore, respectfully submitted that the law of the State of New York to-day is that the City of New York is not responsible for the wrongs of its Fire Department.

VIII.

While the fire-boat may, perhaps, be classified as a maritime instrumentality, the result of this collision presents one of those exceptions to holding the City liable under the Maritime Law which is distinctly a requirement of public policy.

Judge Morris, in deciding the case of The F. C. Latrobe, in the 28th Federal Reporter, page 377, while

in that case he held the municipality liable, nevertheless distinctly recognized the fact that where a municipality employs maritime instrumentalities, there are exceptions to holding the municipality liable under the general doctrine of the Maritime Law, which exceptions are based on considerations of public policy.

A boat such as the "New Yorker," while capable of being navigated and in that sense being a maritime instrumentality, is nevertheless built, maintained and navigated for a specific purpose, and not for the usual objects for which vessels are built.

If the "Linda Park" had caught fire it would have been the duty of the fire-boats operated by the Fire Department of the City of New York to do all that in them lay to extinguish the fire, nor would they have had any claim whatever for salvage.

The Blackwall, 10 Wall, p. 1.
Davey *vs.* "The Mary Frost," 2 Woods, p. 306.
Murphy *vs.* Ship "Suliote," 5 Yed. Rep., 99.
The "European," 13 U. S. App., p. 643.

It is to be observed that all the fire-boats owned by the City of New York are constructed, controlled and operated under local laws, which laws have been construed by the highest Court in the State of New York, and this Court has held that whenever the decisions of a State Court relate to some law of a local character, the decisions upon that subject are conclusive.

In the case of Detroit *vs.* Osborne, the Supreme Court of the United States, Mr. Justice Brewer delivering the opinion of the Court, said, and quoting from the opinion in the case of Bucher *vs.* The Railroad Company, 125 U. S., 555:

"It may be said generally that whenever the
"decisions of the State courts relate to some law

" of a local character which may have become es-
" tablished by those courts, or has always been a
" part of the law of the State, that the decisions
" upon the subject are usually conclusive, and al-
" ways entitled to the highest respect of the
" Federal courts."

Detroit *vs.* Osborne, 135 U. S., 499.

And to the same effect Burgess *vs.* Seligman, 107 U. S., 20; Clairborne Co. *vs.* Brooks, 111 U. S., 400.

In the case of Haight and another against The Mayor, Aldermen and Commonalty of the City of New York, decided by the learned Judge of the District Court in May, 1885, the general principle now contended for was approved and the libel in that case dismissed.

In the opinion in that case Mr. Justice Brown said:

" These facts bring the case, so far as I can see,
" entirely within the decision in the case of Maxi-
" milian *vs.* The Mayor, 62 N. Y., 161, where the
" responsibility of the Corporation for the negli-
" gent acts of persons in the employ of the De-
" partment of Charities and Corrections is dis-
" cussed by Folger, *C. J.*, with his usual fullness
" and learning; and the conclusion was there ar-
" rived at, sustained by principle and authority,
" that the corporation could not be held for the
" negligent acts of the employees of that depart-
" ment, because it is an independent board, over
" which the corporation has no control, and which
" does not act for the benefit of the corporation in
" the discharge of any of its corporate functions or
" duties."

Haight *vs.* The Mayor, 24 Fed. Rep., 93.

In the case of Edgerton *vs.* The Mayor, also decided by Mr. Justice Brown, and in which the differences between the liabilities of the City for the acts of the dif-

ferent departments were fully discussed, Mr. Justice Brown says:

> "I deem it unnecessary to consider here the "somewhat nice distinctions which have been "made in the several cases decided in the Court "of Appeals in this State as regards the liability "of a city corporation for the negligent acts of the "servants employed under its different heads of "departments, as constituted by law. As respects "negligence by the employees of the Department "of Public Charities and Correction, of the *Fire* "*Dep ment*, and of the Board of Education, it "has been adjudged that the Corporation is not "liable (Maximilian *vs.* Mayor, etc., 62 N. Y., "166; Smith *vs.* City of Rochester, 76 N. Y., 506; "Ham *vs.* Mayor, etc., 70 N. Y., 459). The first of "these cases was followed by this Court in the "case of Haight *vs.* Mayor, etc., 24 Fed. Rep., "93."
>
> Edgerton *vs.* The Mayor, 27 Fed. Rep., 232.

IX.

The Argument of Ab Inconvenienti.

A large part of the brief of libellant is taken up with attempting to show the very great dangers which will flow from holding a city not liable for the acts of its fire-boat.

The industry of the counsel for libellant has collected at page 23 of his original brief a list of twenty-four municipal fire-boats (belonging to eleven cities), which have been built within the last twenty-five years.

One answer to the alarming picture drawn by the learned counsel of possible injury inflicted by fire-boats

is that the present case is the first one ever brought against a municipality for the tort of such a boat, and there is but one other to be found—The Thompson Navigation Company *vs.* The City of Chicago, referred to in the supplemental brief of libellant.

It is apparent, therefore, that if in the whole country in twenty-five years there have been but two suits brought of this character, the danger of damage to shipping from this source is not shown to be every great.

In addition to this statement of the actual fact, as opposed to theory, it may be noted that the libellant's contention that the Court in this case should be governed by the doctrine *ab inconvenienti* leads to very curious consequences.

The Government of the United States is the owner of many vessels.

If the non-liability of a few cities for the torts of twenty-four small fire-tugs is so dangerous, what shall be said of the non-liability of the Government for the torts of its numerous vessels?

The law always has been, and is, that the Government of the United States enjoys entire immunity from suit for the torts of its vessels.

If there was any force to the contention of the libellant in regard to a city, how much more overwhelming would be the reasons for compelling the modification of the doctrine of exemption of the United States Government!

That there has been no such demand for such exemption, nor any complaint of hardship worked by it, shows that the fears of libellant in regard to the fireboats of the cities entirely unfounded.

X.

The Objection of Want of Uniformity.

This objection is raised at page 6 *et seq.* of libellant's supplemental brief.

The answer is, that in this country the rule of non-liability of municipal corporations for the acts of officers who fulfill governmental functions *is absolutely uniform*, and as is shown by the cases cited at page 26 *et seq.*

On a point which forms a part of the one just mentioned, namely, that the differing State systems are not steadfast, the libellant cites two cases: Barney Dumping Boat Co. *vs.* Mayor, 40 Fed. Rep., 450; and Bishop *vs.* The Mayor, 20 Misc., N. Y., 598; both cases having relation to the Street Cleaning Department of New York City.

The Barney Dumping Boat case held the City liable for the torts of the department in question, and the case of Bishop *vs.* The Mayor, which was a case at Trial Term in the Supreme Court in New York County, has been since reversed by the Appellate Division of the Supreme Court under the name of Quill *vs.* The Mayor, 36 App. Div., N. Y., 476, already referred to at page 18, *ante.*

As both the cases, therefore, cited by the learned counsel are to the same effect, it cannot complain that they are "uncertain and shifting guides."

XI.

Distinguishable Cases.

Of the cases cited in the brief of libellant, the following do not apply to the present case, for the reasons hereinafter stated in regard to each of them:

Shields vs. *Mayor*, 18 Fed. Rep. 748:

The question litigated was simply as to the existence or non-existence of negligence, and no question was raised such as the responsibility of the City for the acts of its departments.

The Fidelity, 16 Blatch., 569:

This case holds that a municipal steam-tug used by the Department of Public Charities and Correction of The City of New York in the performance of duties imposed on that department by law cannot be seized *in rem.*

The Giovanni vs. *City of Philadelphia*, 59 Fed. Rep., 303:

This case holds that a city which, pursuant to its Charter, engages in the business of towing vessels for hire is liable for a collision caused by the fault of its tug. It is evident in such a case that the City is on the same footing as a private corporation engaged in the towing business.

The C. F. Lotrobe, 28 Fed. Rep., 377:

In this case an ice-boat belonging to the City of Baltimore at the time of the collision was not employed in the public service, but was putting passengers and stores on board an out-going vessel, at the request of a disabled tug, taking the place of that tug for the purpose indicated.

Guthrie vs. *Philadelphia*, 73 Fed. Rep., 688:

In this case an ice-boat was engaged in a private secvice for which the City charged compensation. It was breaking a schooner out of the ice and towing her down the bay.

Greenwood vs. *The Town of Westport*, 60 Fed. Rep., 560:

In this case the damage was caused by a drawbridge operated by a town, as to which bridge the town had assumed the obligations, under the law, of a private corporation.

Haight vs. *Mayor*, 24 Fed. Rep., 93:

This was the case of a collision between a schooner and a steamboat in the service of the Department of Charities and Correction. The City was held not liable.

The decision in the Haight case was rendered by the same learned District Judge, whose decision in the present case was reversed by the Circuit Court of Appeals, and it seems impossible to reconcile his opinions in the two cases.

In the Haight case he applied the principle of the Maximilian case "as sustained by *principle and authority*," to a tug in the employment of the Department of Charities and Correction (see p. 39, *ante*), but in the present case he refused to follow the principle of the Maximilian case.

The exemption from liability of a municipal corporation for the acts of a fire department is, as has been shown by the long array of cases hereinbefore cited in Point V. of this brief, as absolute as the exemption of a city from liability for the acts of its Department of Charities.

In fact, in view of the stress under which a fire department must act in the extinction of fires, there is a much stronger practical reason for the exemption

in the case of a fire department than in that of a department of charities.

If, therefore, the City is not liable for damage caused by a collision of a tug employed in the Department of Charities and Correction it is surely not liable for negligence of a tug employed by the Fire Department.

It is impossible to reconcile the decision of the learned Judge in the Haight case with that in the case at bar, also rendered by him.

Edgerton vs. *Mayor*, 27 Fed. Rep., 230 :

In this case damages were recovered for negligence in the management of a draw-bridge over the Harlem River.

The distinguishing feature of this case, and which furnished the ground for the decision of the Court, was that the draw-bridge in question was part of a public highway, and that in its management the City was under the same rule of liability as regards the management of its streets and other highways.

Thompson Navigation Company vs. *The City of Chicago*, 79 Fed. Rep., 984 :

This case is cited in the supplementary brief of the learned counsel for libellant, and is apparently much relied upon him.

The first consideration which presents itself upon examination of this case is, that it does not appear whether the tug in question at the time of the collision was going to, or coming from, a fire—a question which has a very important bearing under the case of Farley *vs.* Mayor, 152 N. Y., 227, and is of great importance on the question of negligence.

It will be also noted that the case now cited was a decision of a District Court, and therefore has no

higher authority than the decision of the learned Justice at the District Court in the present case.

It is also to be noted that the learned District Judge, in the Thompson Navigation Company case entirely ignores the decision of the Circuit Court of Appeals in the present case, and avowedly overrules the decision of Chief-Justice Waite in the case of The Fidelity, 16 Blatch., 569—a decision made by the Chief Justice at the Circuit.

Commune de Charenton C. Gillett, Dalloz Jurisp. Generale, year 1883, part I., p. 211:

The citation of this case furnishes in a very striking degree an example of the danger of false analogy.

It would take very much more space than is at the disposal of counsel to point out the vital differences between the French and American systems of jurisprudence on such questions as this; but the fact cannot be contested by the learned counsel for the libellant that whether the Charenton case is rightly or wrongly decided under the jurisprudence of France, it is opposed to the entire weight of authority of our American courts.

The present counsel for the City of New York are entirely unable to perceive why a ruling of a French court in an ordinary action for damages for negligence is any more applicable to a case of collision in American waters than is the law on the same subject of negligence of municipal corporations of this country.

Surely, if we are to apply, as the City of New York contends, the ordinary rules of negligence law to the present collision, we can find that law most clearly laid down in this country, without seeking it from other and different systems of jurisprudence.

Bailey vs. *Mayor*, 3 Hill, 531:

See *ante*, pp. 11, 19.

The Siren, 7 Wall, 152:

This case is cited in The Thompson Navigation Co. *vs.* City of Chicago, 79 Fed. Rep., 984, so much relied on by libellant.

It appears, however, that the case sustains in no respect his contention.

In that case, the exemption of the Government was claimed on the ground that, being a sovereign, it could not be sued.

And this the Court held, but further held that as the Government came into court and made through its affirmative action the property upon which the claim existed subject to the Court's jurisdiction, in such case the Court could enforce the rights of private claimants upon the proceeds of the sale of the prize vessel in question.

* * * * * *

And the Court in this case said:

"It is a familar doctrine of the common law, "that the sovereign cannot be sued in his own "courts without his consent. The doctrine rests "upon reasons of public policy: the inconvenience "and danger which would follow from any different "rule. It is obvious that the public service "would be hindered, and the public safety "endangered, if the supreme authority could be "subjected to suit at the instance of every citizen, "and consequently controlled in the use and dis-"position of the means required for the proper "administration of the government. The exemp-"tion from direct suit is, therefore, without excep-"tion. This doctrine of the common law is "equally applicable to the supreme authority of "the nation—the United States. They cannot be "subjected to legal proceedings at law or in "equity without their consent; and whoever in-"stitutes such proceedings must bring his case

" within the authority of some act of Congress."
* * *

" The same exemption from judicial process ex-
" tends to the property of the United States, and
" for the same reasons. As justly observed by the
" learned judge who tried this case, *there is no dis-*
" *tinction between suits against the Government*
" *directly and suits against its property.*"

" For the damages occasioned by collision of
" vessels at sea a claim is created against the ves-
" sel in fault, in favor of the injured party. This
" claim may be enforced in the Admiralty by a pro-
" ceeding *in rem* except where the vessel is the
" property of the United States. In such case the
" claim exists equally as if the vessel belonged to a
" private citizen, but for reasons of public policy,
" already stated, cannot be enforced by direct
" proceedings against the vessel. It stands, in
" that respect, like a claim against the Government
" —incapable of enforcement without its consent,
" and unavailable for any purpose " (7 Wall., 153–155).

Joyce vs. *Metropolitan Board of Works*, 44 Law Times, 811 :

This case is open to the same objection as the French cases cited by the libellant, namely, as being under a system of jurisprudence which on the questions at issue is different from our own.

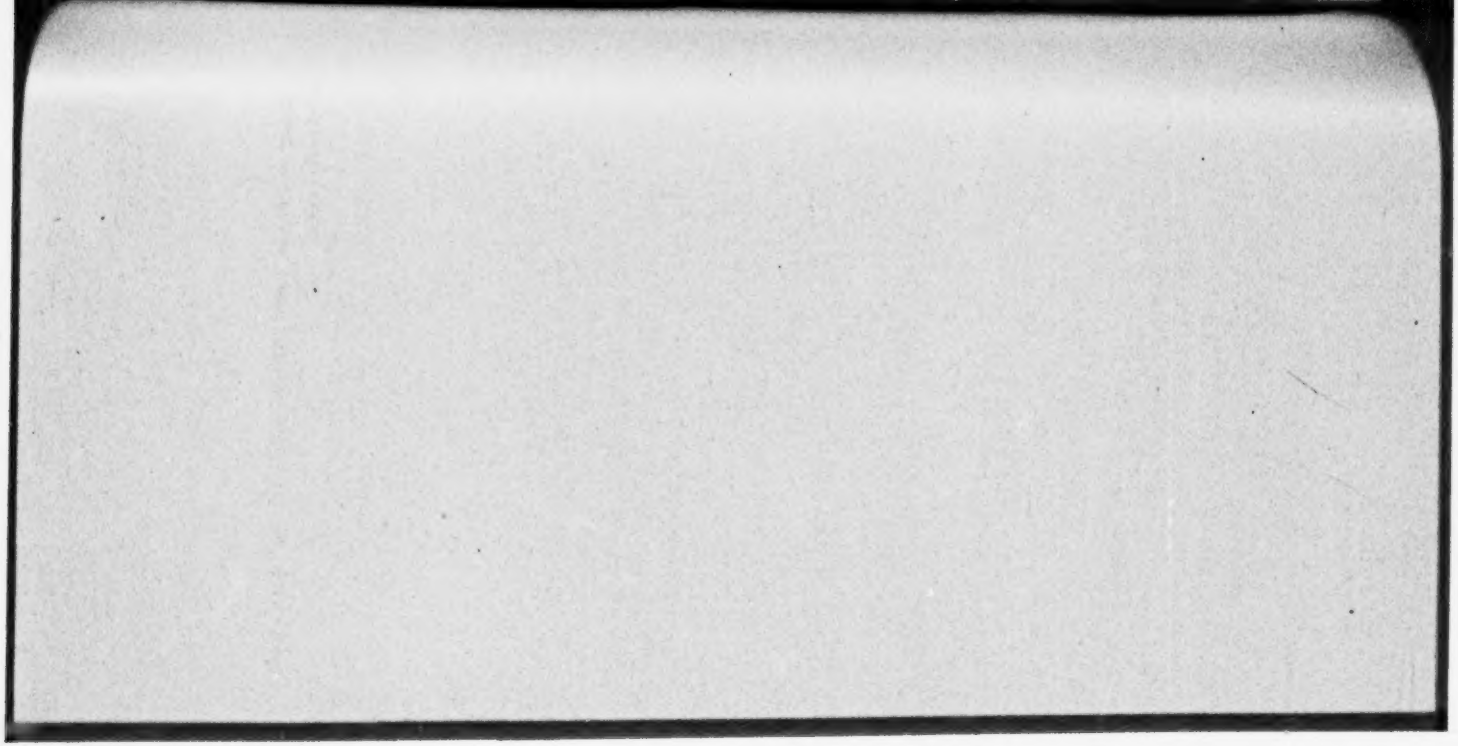
In the case cited, however, an examination of it shows that the only question litigated was the question of negligence, and that the question of the re-responsibility of the Metropolitan Board of Works for the fire brigade was scarcely put in issue.

XII.

The writ of certiorari should be quashed or dismissed.

Dated 7 April, 1899.

THEODORE CONNOLY,
JAMES M. WARD,
Advocates for Appellants.



Supreme Court of the United States.

No. 1.—October Term, 1900.

Robert W. Workman, Petitioner,
vs.
The Mayor, Aldermen and Commonalty of the City of New York, and James A. Gallagher.

On writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit.

Workman, the libellant below, was the owner, on June 11, 1893, of the British barkentine *Linda Park*. On the date named, while the vessel was moored to a dock at pier 48 in the East River in New York City, she was struck and injured by the steam fire-boat *New Yorker*. At the time of the collision the *New Yorker* was running into the slip between piers 48 and 49 for the purpose of getting near to another fire-boat which had shortly prior thereto safely entered the slip. Both the fire-boats had been called in order to aid in extinguishing a fire in a warehouse situated a distance of eighty-five to one hundred feet from the slip bulkhead. To recover the damage occasioned to his vessel, Workman filed, in the District Court of the United States for the Southern District of New York, a libel *in personam* against the Mayor, Aldermen and Commonalty of the city of New York. This libel was subsequently amended by adding the allegations essential to make, as additional respondents, the fire department of the city of New York and James A. Gallagher, the person in charge of the navigation of the *New Yorker* at the time of the collision.

The District Court entered a decree in favor of the libellant against the city of New York and Gallagher, and dismissed the libel as to the fire department. (63 Fed. Rep. 298.)

The Circuit Court of Appeals, to which the case was taken, affirmed the decree of the District Court against Gallagher and in favor of the fire department. The appellate court, however, reversed that portion of the decree of the District Court which held the city of New York liable, and remanded the case with instructions to dismiss the libel as against the city. (35 U. S. App. 201; 67 Fed. Rep. 347.)

The case was then brought to this court by the allowance of a writ of certiorari.

[December 24, 1900.]

Mr. Justice White, after making the foregoing statement, delivered the opinion of the Court.

It is clearly deducible from the record that the courts below concurred in dismissing the libel as against the fire department of the city of New York, upon the contention made in the answer of the department that

under the provisions of a named statute of the State of New York, the fire department of the city of New York was neither a corporation nor a *quasi* corporation, but was merely a department of the city. As no controversy is made respecting the correctness of the decree in this particular, we dismiss this subject from view.

With reference to the decree rendered by both courts against Gallagher, the district judge held that, giving due consideration to the emergency of fire, "the running into the *Linda Park* arose through lack of reasonable prudence, and was unnecessary and negligent." (63 Fed. Rep. 298.) The Circuit Court of Appeals, in its opinion, affirming the decree against Gallagher, said:

"The evidence in the record adequately supports the conclusion of the court below that the injuries caused to the libellant's vessel by the impact of the fire-boat were caused by the negligent manner [management?] of the fire-boat while the latter was trying to reach a convenient location to play upon a burning building near the pier at which the libellant's vessel was moored."

There is no substantial controversy raised on the record as to the premise of fact upon which the personal decree against Gallagher was rendered by both the courts below. And even if such were not the case, the facts upon which Gallagher's liability depends are not now open to controversy, because of the well settled doctrine that where both courts below have concurred in a finding of fact, it will, in this court, be accepted as conclusive, unless it affirmatively appears that the lower courts obviously erred. (*The Carib Prince*, 170 U. S. 655, 658, and cases there cited.) It is clear that if it was seriously claimed that both the courts below had manifestly erred in their appreciation of the facts as to negligence in the management of the fire-boat, the testimony would not justify the assertion. We shall therefore no further consider this feature of the case.

In order to elucidate the serious question which arises for discussion, we briefly state the reasons by which the courts below were led to reach opposing conclusions as to the liability or non-liability of the city.

The District Court, on the assumption that the local law controlled, determined that by that law, as declared in decisions of the courts of the State of New York, the city was liable for the injury caused by the negligent management of its fire-boat. The Circuit Court of Appeals, however, was of opinion that the city of New York was not answerable for the injury inflicted, for the reasons which it thus stated (35 U. S. App. 204):

"It is familiar law that the officers selected by a municipal corporation to perform a public service for the general welfare of the inhabitants or the community, in which the corporation has no private interest and from which it derives no special benefit or advantage in its corporate capacity, are not to be regarded as the servants or agents of the municipality, and for their negligence or want of skill it cannot be held liable. This is so,

notwithstanding such officers derive their appointment from, and are paid by, the corporation itself. In selecting and employing them, the municipality merely performs a political or governmental function; the duties intrusted to them do not relate to the exercise of corporate powers, and hence they are the agents or servants of the public at large. Upon this principle it has uniformly been decided by the courts that municipal corporations are not liable for the negligence or wrongful acts of the officers of the police or health departments committed in the course of their ordinary employment. Unless the duties of the officers of the fire department are of a different complexion, and they are the servants of the municipality because they are engaged in performing one of its corporate functions, the same principle must extend immunity to the municipality for the negligent acts of these officers and their subordinates.

* * * * * *

"It is quite immaterial that the duties of these officers are defined and the offices created by the charter or organic law of the municipality. The test of corporate liability for the acts of the officers of the municipality depends upon tbe nature of the duties with which they are charged. If these, being for the general good of the public as individual citizens, are governmental, they act for the State. If they are those which primarily and legitimately devolve upon the municipality itself, they are its agents."

Having thus determined the general principle by which the liability of the city was to be judged, the court reviewed some of the decisions of the Court of Appeals of New York, and deduced from them that the city, in the operation of the fire-boat, performed a governmental and not a corporate function, and, therefore, under the assumption that the decisions in question were authoritatively controlling, held the city not liable.

Whilst it is contended at bar that the District Court correctly decided, considering the local law of New York alone, that the city was liable, it is also asserted that even if by such law there was no responsibility on the part of the city of New York, nevertheless the Circuit Court of Appeals erred in deciding that the city was not bound, because by the maritime law the liability existed, and such law should have controlled, although the local law was to the contrary.

We come then to consider first, whether, in the decision of the controversy, the local law of the city of New York or the maritime law should control; and, second, if the case is solely governed by the maritime law, whether the city of New York is liable.

In examining the first question, that is, whether the local law of New York must prevail, though in conflict with the maritime law, it must be borne in mind that the issue is not—as was the case in *Detroit* v. *Osborne*, (1890) 135 U. S. 492—whether the local law governs as to a controversy arising in the courts of common law or of equity of the United States, but does the local law, if in conflict with the maritime law, control a court of admiralty of the United States in the administration of maritime rights and duties, although judicial power with respect to such sub-

jects has been expressly conferred by the Constitution (Art. III, sec. 2) upon the courts of the United States.

The proposition then which we must first consider may be thus stated: Although by the maritime law the duty rests upon courts of admiralty to afford redress for every injury to person or property where the subject-matter is within the cognizance of such courts and when the wrongdoer is amenable to process, nevertheless the admiralty courts must deny all relief whenever redress for a wrong would not be afforded by the local law of a particular State or the course of decisions therein. And this, not because, by the rule prevailing in the State, the wrongdoer is not generally responsible and usually subject to process of courts of justice, but because in the commission of a particular act causing direct injury to a person or property it is considered, by the local decisions, that the wrongdoer is endowed with all the attributes of sovereignty, and therefore as to injuries by it done to others in the assumed sovereign character, courts are unable to administer justice by affording redress for the wrong inflicted.

The practical destruction of a uniform maritime law which must arise from this premise, is made manifest when it is considered that if it be true that the principles of the general maritime law giving relief for every character of maritime tort where the wrongdoer is subject to the jurisdiction of admiralty courts, can be overthrown by conflicting decisions of State courts, it would follow that there would be no general maritime law for the redress of wrongs, as such law would be necessarily one thing in one State and one in another; one thing in one port of the United States and a different thing in some other port. As the power to change State laws or State decisions rests with the State authorities by which such laws are enacted or decisions rendered, it would come to pass that the maritime law affording relief for wrongs done, instead of being general and ever abiding, would be purely local—would be one thing to-day and another thing to-morrow. That the confusion to result would amount to the abrogation of a uniform maritime law is at once patent. And the principle by which the maritime law would be thus in part practically destroyed would besides apply to other subjects specially confided by the Constitution to the Federal Government. Thus, if the local law may control the maritime law, it must also govern in the decision of cases arising under the patent, copyright and commerce clauses of the Constitution. It would result that a municipal corporation, in the exercise of administrative powers which the State law determines to be governmental, could with impunity violate the patent and copyright laws of the United States or the regulations enacted by Congress under the commerce clause of the Constitution, such as those concerning the enrollment and licensing of vessels. This follows if a corporation must for a wrong by it done, be allowed to escape all reparation upon the theory that, though

ordinarily liable to sue and be sued, it possessed in the particular matter the freedom from suit which attaches to a sovereign State.

The disappearance of all symmetry in the maritime law and the law on the other subjects referred to, which would thus arise, would, however, not be the only evil springing from the application of the principle relied on, since the maritime law which would survive would have imbedded in it a denial of justice. This must be the inevitable consequence of admitting the proposition which assumes that the maritime law disregards the rights of individuals to be protected in their persons and property from wrongful injury, by recognizing that those who are amenable to the jurisdiction of courts of admiralty are nevertheless endowed with a supposed governmental attribute by which they can inflict injury upon the person or property of another, and yet escape all responsibility therefor. It cannot be doubted that the greater part, if not the whole, of the maritime commerce of the country is either initiated or terminated in ports where municipal corporations exist. All the vessels, whether domestic or foreign, in which this vast commerce is carried, under the rule referred to, could be subjected to injury and wrong without power to obtain redress, since every municipality would be hedged about with the attributes of supreme sovereignty. For the principle which would exempt the municipal owner of a fire-boat from legal responsibility would be equally applicable to boats used by a street department for the removal of refuse, to ferries, to pilot boats, to training-school ships—one of which, it is suggested in argument, the city of New York now actually operates, and to all other vessels which the municipality might consider it necessary or desirable to use. The wrong and injustice which would thus arise need not be commented upon.

The evil consequences growing from thus implanting in the maritime law the doctrine that wrong can be done with impunity were very aptly pointed out in *Mersey Docks, Trustees*, v. *Gibbs*, (1866) L. R. 1 H. L. 122. In that case it was sought to hold the dock trustees liable for damage occasioned to a ship and cargo in striking a mud bank while attempting to enter a dock. The trustees asserted an exemption on the ground that they did not collect tolls for their own profit, but merely as trustees for the benefit of the public. Lord Chancellor Cranworth said:

"It would be a strange distinction to persons coming with their ships to different ports of this country, that in some ports, if they sustain damage by the negligence of those who have the management of the docks, they will be entitled to compensation, and in others they will not; such a distinction arising, not from any visible difference in the docks themselves, but from some municipal difference in the constitution of the bodies by whom the docks are managed."

And still later, in deciding the case of *Currie* v. *McKnight*, (1897) A. C. 97, the House of Lords declared that while the admiralty law as known in England differs from the common law of England, and the

common law of Scotland differs from the common law of England, because they were derived from divergent sources, yet the admiralty laws were derived both by Scotland and England from the same source, and "it would be strange as well as in the highest degree inconvenient if a different maritime law prevailed in two different parts of the same island."

Potential, however, as may be these arguments, predicated on the inherent injustice of the doctrine contended for, and the serious inconvenience which must result from an attempt to apply it, we are not thereby relieved from considering the question in a more fundamental aspect. In doing so, it becomes manifest that the decisions of this court overthrow the assumption that the local law or decisions of a State can deprive of all rights to relief, in a case where redress is afforded by the maritime law and is sought to be availed of in a cause of action maritime in its nature and depending in a court of admiralty of the United States.

In *The Key City*, (1872) 14 Wall. 623, 660, it was held that Federal courts of admiralty were not governed by State statutes of limitation in the enforcement of maritime liens. In *The Lottawanna*, (1874) 21 Wall. 558, 578, it was held that the maritime law as accepted and received in this country did not confer a lien upon a vessel in favor of those who had furnished necessary materials, repairs and supplies for such vessel in her home port, but, that, the District Courts of the United States, having jurisdiction of the contract as a maritime one, might enforce liens given for its security, even when created by the State law.

In the course of the opinion, speaking through Mr. Justice Bradley, the court said (pp. 572, 573, 574):

"Whilst it is true that the great mass of maritime law is the same in all commercial countries, yet, in each country, peculiarities exist either as to some of the rules or in the mode of enforcing them. Especially is this the case on the outside boundaries of the law, where it comes in contact with or shades off into the local or municipal law of the particular country and affects only its own merchants or people in their relations to each other."

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"That we have a maritime law of our own, operative throughout the United States, cannot be doubted. The general system of maritime law which was familiar to the lawyers and statesmen of the country when the Constitution was adopted, was most certainly intended and referred to when it was declared in that instrument that the judicial power of the United States shall extend 'to all cases of admiralty and maritime jurisdiction.'"

"The Constitution does not attempt to draw the boundary line between maritime law and local law; nor does it lay down any criterion for ascertaining that boundary: It assumes that the meaning of the phrase 'admiralty and maritime jurisdiction' is well understood. It treats this matter as it does the cognate ones of common law and equity, when it speaks of 'cases in law and equity,' or of 'suits at common law,' without defining those terms, assuming them to be known and understood.

"One thing, however, is unquestionable; the Constitution must have referred to a system of law coextensive with, and operating uniformly in, the whole country. It certainly could not have been the intention to place the rules and limits of maritime law under the disposal and regulation of the several States, as that would have defeated the uniformity and consistency at which the Constitution aimed on all subjects of a commercial character affecting the intercourse of the States with each other or with foreign states."

In *Liverpool Steam Co.* v. *Phœnix Insurance Co.*, (1889) 129 U. S. 397, 443, a maritime contract executed in New York was held to be an American contract, and the local law of New York was declared not to govern in its construction. In *Butler* v. *Boston Steamship Company*, (1889) 130 U. S. 527—a case growing out of a collision in navigable waters within the territorial boundaries of Massachusetts—it was held that a State statute could not operate to deprive the owner of the offending ship of the benefit of the limited liability act, and that State legislatures could not change or modify the general maritime law. In *The Max Morris*, (1890) 137 U. S. 1, 14, the question for decision was, whether, in a court of admiralty, in a case where recovery was sought for personal injuries to the libellant arising from his negligence, concurring with that of the vessel, "any damages can be awarded, or whether the libel must be dismissed, *according to the rule in common law cases.*" (p. 8.) It was held (p. 15) that "The mere fact of the negligence of the libellant as partly occasioning the injuries to him, when they also occurred partly through the negligence of the officers of the vessel, does not debar him entirely from a recovery." In *The J. E. Rumbell*, (1893) 148 U. S. 1, 17, it was held that any priority given by a State statute, or by decisions in common law or in equity, to a mortgage upon a vessel as against a claim for supplies and necessaries furnished to the vessel in her home port, was immaterial, "and that the Federal courts of the United States, enforcing the lien because it is maritime in its nature, arising out of the maritime contract, must give it the rank to which it is entitled by the principles of the maritime and admiralty law."

True, it is well settled that in certain cases where a lien is given by a State statute, the admiralty courts will enforce rights so conferred when not in absolute conflict with the admiralty law. *The Lottawanna*, (1874) 21 Wall. 558. Moreover, it has been decided that although at the time of the adoption of the Constitution, in courts of admiralty as in courts of common law, a cause of action for a personal injury abated by the death of the injured party, nevertheless, when, by a State statute, a right of recovery in such a case was conferred, the admiralty courts would recognize and administer the appropriate relief. *The Albert Dumois*, (1900) 177 U. S. 257–259, and cases cited. But such cases afford no foundation for the proposition that State laws or decisions can deprive an individual of a

right of recovery for a maritime wrong which, under the general principles of the admiralty law, he undoubtedly possessed, and can destroy the symmetry and efficiency of that law by engrafting therein a principle which violates the imperative command of such law that admiralty courts must administer redress for every maritime wrong in every case where they have jurisdictional power over the person by whom the wrong has been committed. The cases in question on the contrary but illustrate the alacrity with which admiralty courts adopt statutes granting the right to relief where otherwise it could not be administered by a maritime court, and they hence do not support the contention that there is a want of power in admiralty courts to give redress in every case within their jurisdiction where the duty to do so is imposed by the maritime law. This distinction is well illustrated by the ruling in *The Max Morris*, *supra*. There it was asserted that by the universal principles of the common law, as well as of the local laws of the States, no right to recover for a wrong committed could be enforced in favor of one who had himself contributed to the producing cause of the injury. Whilst the premise was conceded the soundness of the inference deduced from it was denied, and it was held that as by the general principles of the maritime law a measure of relief would be afforded to a person who had suffered a wrong, even although he had contributed thereto, *it was the duty of the admiralty courts to grant relief* in accordance with the principles of the maritime law.

It being then settled that the local decisions of one or more States cannot, as a matter of authority, abrogate the maritime law, we are brought to consider whether, under the maritime law, the city of New York was liable for the injury inflicted by the fire-boat. As a prerequisite to a solution of this question it is necessary to determine what relation the city of New York bore to the fire-boat and those in control of it.

The fire department of the city of New York, as constituted when the collision in question occurred, was established by chapter 410 of the New York Laws of 1882. In the statute it was declared (sec. 27) that "for all purposes the local administration and government of the city and county of New York shall continue to be in and be performed by the corporation aforesaid," *i. e.* "the mayor, aldermen and commonalty of the city of New York." By section 34 were established eleven enumerated "departments in said city," among them a fire department. By sections 40, 106 and 108, provision was made for a board of fire commissioners, to act as the executive head of the department, to be nominated by the mayor, by and with the consent of the board of aldermen, and to be removable for cause by the mayor, subject to the approval of the governor of the State. The ministerial direction of the affairs of the department, including the preservation of the real and personal property used by it, was confided to this board of commissioners, but the city was made liable for all expenses of

maintenance and operation, and was the owner of all the property of the fire department. (Secs. 424 *et seq.*) In addition to making the city liable for all expenses connected with the maintenance and operation of the department, it was provided in section 450 of the statute that any damage caused by the authorized destruction of buildings to stay the progress of fire should be borne by the city of New York.

In order to emphasize these material facts we repeat that it unquestionably appears that the fire department of the city of New York was an integral branch of the local administration and government of that city. The ministerial officers who directed the affairs of the department were selected and paid by the city; all the expenses of the department of every kind and nature were to be borne by the city, which was bound by all contracts made for such purpose; all the property of the department, including the fire-boats, belonged to the city; and the city was liable in case of an authorized destruction on land of property of individuals to prevent the spread of a conflagration.

That, upon such a state of things, the relation of master and servant existed between the city of New York and those in charge of the fire-boat is clear. And that under the general maritime law, where the relation of master and servant exists, an owner of an offending vessel committing a maritime tort is responsible, under the rule of *respondeat superior*, is elementary. *Thorpe* v. *Hammond*, (1871) 12 Wall. 408; *The Plymouth*, (1866) 3 Wall. 35.

It is not gainsaid that, as a general rule, municipal corporations, like individuals, may be sued; in other words, that they are amenable to judicial process for the purpose of compelling performance of their obligations. True it is, that under the general law, growing out of the public nature of their duties, where judgments or decrees are entered against municipal corporations, such judgments or decrees may not, as a matter of public policy, be enforced by the levy on property held by the corporation for public uses. *Meriwether* v. *Garrett*, (1880) 102 U. S. 472.

As a result of the general principle by which a municipal corporation has the capacity to sue and be sued, it follows that there is no limitation taking such corporations out of the reach of the process of a court of admiralty, as such courts, within the limit of their jurisdiction, may reach persons having a general capacity to stand in judgment. True, also, where admiralty process has been set in motion against a municipal corporation, public policy, it has been held, restrains a seizure of property used for public purposes by such corporation. *The Fidelity*, (1879) 17 Blatch. 569. This conclusion, however, is but the application of the exception as to the mode of execution of a judgment or decree against such a corporation, to which we have referred, and its existence in the admiralty law in all cases has also been denied. *The Oyster Police*

Steamers of Maryland, (1887) 31 Fed. Rep. 763. Which of these conflicting conclusions, as to the exception in question, is correct we are not called upon on the present record to determine, since no levy of process upon the fire-boat was made or attempted to be made.

The contention is, although the corporation had general capacity to stand in judgment, and was therefore subject to the process of a court of admiralty, nevertheless the admiralty court would afford no redress against the city for the tort complained of, because under the local law the corporation as to some of its administrative acts was entitled to be considered as having a dual capacity, one private, the other public or governmental, and as to all maritime wrongs committed in the performance of the latter functions it should be treated by the maritime law as a sovereign. But the maritime law affords no justification for this contention, and no example is found in such law, where one who is subject to suit and amenable to process is allowed to escape liability for the commission of a maritime tort, upon the theory relied upon. We, of course, concede that where maritime torts have been committed by the vessels of a sovereign, and complaint has been made in a court of admiralty, that court has declined to exercise jurisdiction, but this was solely because of the immunity of sovereignty from suit in its own courts. So, also, where, in a court of admiralty of one sovereign, redress is sought for a tort committed by a vessel of war of another nation, it has been held that as by the rule of international comity the sovereign of another country was not subject to be impleaded, no redress could be given. Both of these rules, however, proceed upon the hypothesis of the want of a person or property before the court over whom jurisdiction can be exerted. As a consequence, the doctrine above stated rests not upon the supposed want of power in courts of admiralty to redress a wrong committed by one over whom such courts have adequate jurisdiction, but alone on their inability to give redress in a case where jurisdiction over the person or property cannot be exerted. In other words, the distinction between the two classes of cases is that which exists between the refusal of a court to grant relief because it has no jurisdiction to do so, and the failure of a court to afford redress in a case where the wrong is admitted and jurisdictional authority over the wrongdoer is undoubted.

The decisions of this court clearly expound the principles we have stated. *The Exchange,* (1812) 7 Cranch 116, involved the right of a court of admiralty to enforce, by a proceeding *in rem,* an alleged maritime claim against a vessel of war of a foreign nation. The right to relief was denied exclusively because of a want of jurisdiction over the foreign sovereign or his property.

The Siren, (1869) 7 Wall. 153, involved the liability of a prize ship in the possession and control of the officers of the United States for an

injury inflicted by a collision of the ship with another vessel, averred to have been occasioned by the negligent management of those in charge of the prize ship. In considering the power of the court to adjudicate the controversy, the court said (p. 185):

"For the damages occasioned by collision of vessels at sea a claim is created against the vessel in fault, in favor of the injured party. This claim may be enforced in the admiralty by a proceeding *in rem*, except where the vessel is the property of the United States. In such case the claim exists equally as if the vessel belonged to a private citizen, but for reasons of public policy, already stated, cannot be enforced by direct proceedings against the vessel. It stands, in that respect, like a claim against the government, incapable of enforcement without its consent, and unavailable for any purpose.

"In England, when the damage is inflicted by a vessel belonging to the crown, it was formerly held that the remedy must be sought against the officer in command of the offending ship. But the present practice is to file a libel *in rem*, upon which the court directs the registrar to write to the lords of the admiralty requesting an appearance on behalf of the crown—which is generally given—when the subsequent proceedings to decree are conducted as in other cases. (Coote's New Admiralty Practice, 31.) In the case of *The Athol*, (1 W. Robinson, 382,) the court refused to issue a monition to the lords of the admiralty to appear in a suit for damage by collision, occasioned to a vessel by a ship of the crown; but the lords having subsequently directed an appearance to be entered, the court proceeded with the case, and awarded damages. As no warrant issues in these cases for the arrest of the vessels of the crown, and no bail is given on the appearance, it is insisted that they are brought simply to ascertain the extent of the damages, and that the decrees are little more than awards, so far as the government is concerned. This may be the only results of the suits, but they are instituted and conducted on the hypothesis that claims against the offending vessels are created by the collision. (*The Clara*, 1 Swabey, 3, and *The Swallow*, Ib. 30.) The vessels are not arrested and taken into custody by the marshal, for the reasons of public policy already stated, and for the further reason that it is to be presumed that the government will at once satisfy a decree rendered by its own tribunals in a case in which it has voluntarily appeared."

As the prize vessel had been condemned and sold at the instance of the United States, and the proceeds were in the registry of the court for distribution, the court gave the relief sought against the proceeds of the sale, because the facts stated established, not only the liability of the offending ship, but also furnished the basis of jurisdiction.

The same principle was applied in the later case of *The Davis*, (1869) 10 Wall. 15, where it was held that personal property of the United States on board of a vessel for transportation from one point to another was liable to a lien for salvage service rendered in saving the property from a peril of the sea, and that such lien might be enforced by a proceeding *in rem*, when the process of the court might be used without disturbing the possession of the government.

The statement of the maritime law of England on the subject now being considered made in *The Siren, supra,* makes it clear that, in harmony with the maritime law of this country, the fact that a wrong has been committed by a public vessel of the crown affords no ground for contending that no liability arises, because of the public nature of the vessel, although, it may be, in consequence of a want of jurisdiction over the sovereign, redress cannot be given. This is well illustrated by the cases to which we shall now refer.

The Athol, (1842) 1 Wm. Rob. 374, was the case of a British troopship which had run down a brig in the English Channel. The Lords of the Admiralty having refused a petition for compensation, the owner of the brig applied to the High Court of Admiralty to decree a monition to issue against those officials. In declining to issue the monition, for want of power, Dr. Lushington said (p. 382):

"Under the circumstances of this case then, both upon principle and the authority of decided cases, I must decline to issue the monition as prayed. At the same time, sitting here as a judge, in a court of justice, I am bound to express the opinion that I cannot apprehend the high personages who represent Her Majesty in her office of Admiralty, will avoid doing justice, or that, upon a due consideration, they will take upon themselves to say, that they will be themselves the exclusive judges upon the merits of the present case. Whether they shall appear or not, is not a matter for this court to determine. I decline to grant the monition."

The Lords of the Admiralty subsequently directed that an appearance should be made on behalf of *The Athol,* and as by this act the court had jurisdiction to determine the controversy, it did so, held *The Athol* to have been in fault, and, despite the public nature of the vessel, "the damages and costs were pronounced for."

The Parlement Belge, (1879) 4 P. D. 127, was an action instituted on behalf of the owners of a steam tug against the steamship *Parlement Belge* and her freight to recover damages sustained by the tug in a collision with the steamship. The latter vessel was, at the time of the collision and when the action was instituted, a public vessel of the government of the sovereign state of Belgium, navigated and employed by and in the possession of such government, and officered by officers of the royal Belgium navy, holding commissions from His Majesty the King of Belgium, and in the pay and service of his government. Besides carrying the mails, between Dover and Ostend, the *Parlement Belge* carried passengers and merchandise, and was employed in earning passage-money and freight. Sir Robert Phillimore declared (p. 144) that the case was one of first impression, and to be decided upon general principles and the analogies of law rather than upon any direct precedent, and it was held that the *Parlement Belge* did not come within the category of a ship of war or a pleasure vessel belonging to the crown of Belgium, and was not exempt

from the process of the court. On appeal, however, (5 P. D. 197,) it was held that the admiralty court was concluded by the declaration of the sovereign authority that the vessel was a public vessel of the state, and, further, that the mere fact of the ship having been used subordinately for trading purposes did not take away the immunity attaching to the public vessel of an independent sovereignty, and that the vessel could not be proceeded against.

It results that, in the maritime law, the public nature of the service upon which a vessel is engaged at the time of the commission of a maritime tort affords no immunity from liability in a court of admiralty, where the court has jurisdiction. This being so, it follows that as the municipal corporation of the city of New York, unlike a sovereign, was subject to the jurisdiction of the court, the claimed exemption from liability asserted in the case at bar, because of the public nature of the service upon which the fire-boat was engaged—even if such claim for the purposes of the case be conceded—was without foundation in the maritime law, and therefore afforded no reason for denying redress in a court of admiralty for the wrong which the courts below both found to have been committed.

And these considerations would dispose of the case, were it not for two subordinate contentions which we deem it essential to notice before reaching a conclusion. The first, as expressed in the brief of counsel, is that the injury to the Linda Parke should have been held to have been the result of inevitable accident, because "whatever was done in regard to the navigation of the New Yorker was done in the excitement of the moment, and in view of the extent of not only the possible but probable spread of the fire, under pressure of necessity." Pausing for a moment to analyze this contention it results that it involves the self-destructive assumptions that the maritime law, in order to render the person and property of the individual safe, in case of an emergency arising from the happening of fire, causes both the person and property of the individual to be unsafe, since without necessity and through negligence injury can be inflicted or destruction be brought about, without power, in the admiralty courts, to redress the wrong, although the wrongdoer be amenable to their jurisdiction. But, while it is true that the emergency of fire was an element to be considered in determining whether or not those in charge of the fire-boat were negligent on the occasion in question, since negligence is relative, that is, depends upon whether there was an absence of the care which it was the duty to exercise under the particular circumstances. But it does not follow that the emergency of fire exempted from the exercise of such due care as the occasion required towards property which was in the path of the fire-boat as it approached the slip for the purpose of getting into a position where it might assist in extinguishing the fire in question.

This principle has been heretofore applied by this court. Thus, in *The Clarita*, (1875) 23 Wall. 1, a tug boat, whose business it was to give relief to vessels on fire, in towing a vessel on fire from out of a dock, used a manila hawser. While so engaged the hawser was burnt, and the burning vessel getting loose from the tug, drifted, and set fire to another vessel. It was urged upon the court "that it is the interest of shipping that an enterprising company, like the one which owned this tug—a company which at great expense fits up a tug with powerful steam pumps, and keeps the vessel with her fires banked, night and day, to move on a moment's notice everywhere about a harbor for useful service—should be encouraged;" and the emergency of the occasion it was claimed ought to exempt from liability. In holding that the tug was in fault this court said (p. 15):

"Even ordinary experience and prudence would have suggested that the part of the hawser made fast to the ferryboat should be chain, and that it would be unsafe to use a hawser made of manila. Where the danger is great the greater should be the precaution, as prudent men in great emergencies employ their best exertions to ward off the danger. Whether they had a chain hawser on board or not does not appear, but sufficient does appear to satisfy the court that one of sufficient length to have prevented the disaster might easily have been procured, even if they were not supplied with such an appliance."

And in accord with this doctrine is the local law of New York. Thus, in *Farley* v. *Mayor*, (1897) 152 N. Y. 127, in speaking of the obligation to exercise due care devolving upon the driver of a fire engine, while responding to an alarm of fire, the court said (p. —):

"The conduct of the plaintiff was for the consideration of the jury. . . . He was bound in driving to exercise the care which a prudent person would ordinarily exercise under similar circumstances. It was for the jury to say whether he was alert on this occasion, watchful to avoid obstructions which might be in his path, and whether there was any omission on his part of reasonable circumspection and diligence which contributed to the accident."

And indeed, although there are a number of cases holding that a municipal corporation is not liable for a positive injury to the person or property of an individual inflicted by its fire department, they do not rest upon the doctrine of emergency, which we are now considering. On the contrary, *all these cases but expound the theory of sovereign attribute*, which we have seen does not control the maritime law, and cannot justify an admiralty court in refusing to redress a wrong where it has jurisdiction to do so.

The remaining suggestion is that as a proceeding *in rem* could not have been maintained against the fire-boat because it was the property of the city of New York, and therefore an instrumentality employed in the performance of its municipal functions, no action *in personam* was available to the owner of the injured vessel. As we at the outset said, there

is contrariety of opinion in the lower admiralty courts of the United States as to whether the rule of the courts of common law which exempts from seizure the property of a municipalty devoted to its municipal uses obtains in a court of admiralty of the United States. This conflict, as we have also said, we deem it unnecessary to determine in this case, because, even if it be conceded that the fire boat could not have been seized by process from a court of admiralty, the proposition that, therefore, the owner could not be called upon, in an action *in personam*, to respond for the damages inflicted by the boat, is without foundation. Of course, as has been repeatedly declared by this court, by the general admiralty law of this country, subject to the exemption from process possessed by the National Government, a ship, by whomsoever owned or navigated, is liable for an actionable injury resulting from the negligence of the master and crew of such vessel. *The John G. Stevens*, (1898) 170 U. S. 113, 120, and cases cited, 122. A liability of the owners *in personam*, however, is not dependent upon ability to maintain a proceeding *in rem* because of the maritime tort. A maritime lien may not exist in a cause of collision, for instance, when the thing occasioning the tort was not the subject of a maritime lien, *The Rock Island Bridge*, (1867) 6 Wall. 213; or such a lien, if it exist, may not be enforceable, and so may be said to render the offending thing not the subject of a maritime lien, because of the ownership and possession of such thing being in the government of the nation. *The Siren*, (1869) 7 Wall. 152. Or the remedy *in rem* may not be available owing to the offending thing being actually in another country, or because of its loss intermediate the collision and the institution of legal proceedings.

A recovery can be had *in personam*, however, for a maritime tort when the relation existing between the owner and the master and crew of the vessel, at the time of the negligent collision, was that of master and servant. *Thorpe* v. *Hammond*, (1871) 12 Wall. 408; *The Plymouth*, (1866) 3 Wall. 35.

The prerequisite in admiralty to the right to resort to a libel *in personam* is the existence of a cause of action, maritime in its nature. That a collision upon navigable waters of the United States, between vessels, by the fault of one of such vessels, creates a maritime tort and a cause of action within the jurisdiction of a court of admiralty, is of course unquestioned. And, as said by this court in *In re Louisville Underwriters*, (1890) 134 U. S. 488, 490:

"By the ancient and settled practice of courts of admiralty, a libel *in personam* may be maintained for any cause within their jurisdiction, wherever a monition can be served upon the libellee, or an attachment made of any personal property or credits of his."

Because we conclude that the rule of the local law in the State of New York—conceding it to be as held by the Circuit Court of Appeals—does not control the maritime law, and, therefore, affords no ground for sustaining the non-liability of the city of New York in the case at bar, we must not be understood as conceding the correctness of the doctrine by which a municipal corporation, as to the discharge of its administrative duties, is treated as having two distinct capacities, the one private or corporate, and the other governmental or sovereign, in which latter it may inflict a direct and positive wrong upon the person or property of a citizen without power in the courts to afford redress for such wrong. That question, from the aspect of both the common and municipal law, was considered by this court in *Weightman* v. *Corporation of Washington*, (1861) 1 Black, 39; *Barnes* v. *District of Columbia*, (1875) 91 U. S. 540; and in *District of Columbia* v. *Woodbury*, (1890) 136 U. S. 480. And although this opinion is confined to the controlling effect of the admiralty law, we do not intend to intimate the belief that the common law which benignly above all considers the rights of the individual, yet gives its sanction to a principle which denies the duty of courts to protect the rights of the individual in a case where they have jurisdiction to do so. For these reasons we are sedulous to say that we must not be understood as in anywise doubting the correctness of the doctrines expounded by this court in the cases just cited or as even impliedly approving contentions which may conflict with the principles announced in those cases.

Our conclusion is that the District Court rightly decided that the Mayor, Aldermen and Commonalty of the City of New York were liable for the damages sustained by the owner of the Linda Park.

The decree of the Circuit Court of Appeals for the Second Circuit is reversed, and the decree of the District Court is affirmed.

True copy.

Test:

Clerk Supreme Court, U. S.

Supreme Court of the United States.

No. 1.—October Term, 1900.

Robert W. Workman
vs.
The Mayor, Aldermen and Commonalty of the City of New York.

On writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[December 24, 1900.]

Mr. Justice Gray, for himself and Mr. Justice Brewer, Mr. Justice Shiras and Mr. Justice Peckham, dissenting:

We are unable to concur in this decision; and the case appears to us of such importance as to warrant, if not to require, a statement of the grounds of our dissent.

The question presented by the record is whether the owner of a vessel lying at a dock in the port of New York can maintain a libel in admiralty *in personam* against the city of New York for an injury to his vessel from being run into through the negligence of those in charge of a fire-boat, owned by the city and in the custody and management of its fire department, while hastening to assist in putting out a fire raging in a building at the head of the dock.

We had supposed it to be well settled, on authority and on principle, that no private suit could be maintained against a municipal corporation for an injury to person or property caused by negligence of members of its fire department while engaged in the performance of their official duties.

How far a municipal corporation may be held liable to a private action for the neglect of itself, or of its officers, in the performance of duties imposed upon it or upon them by law, is a subject upon which, in some of its aspects, there has been much difference of opinion in the courts of this country.

The difference has been most marked in actions against a city for injuries from a defect in a highway which the city is bound by its charter to repair. Such actions, when not expressly given by statute, have been held not to be maintainable by the courts of the New England States, and by those of New Jersey, Michigan, Wisconsin, South Carolina, Arkansas and California; but have been held to be maintainable by the courts of every other State in which the question has arisen. The decisions upon that point, in either class of States, are fully collected in 1 Shearman & Redfield on Negligence, (5th ed.) §§ 258, 289.

What kinds of cases may fall within the same rule has been the subject of much doubt and discussion. But it has never, so far as we are aware,

been held by the highest court of any State, that an action at law may be maintained against a municipal corporation for an injury to person or property caused by the negligence of the members of its fire department while engaged in the line of their duty.

It is not only in States whose courts hold that, unless authorized by express statute, no action can be maintained against a city for the neglect of itself or its officers to keep a highway in repair—as throughout New England, and in New Jersey, Wisconsin and California—that no action has been held to be maintainable against a city for negligence of members of its fire department while discharging their duty as such. *Hafford* v. *New Bedford*, (1860) 16 Gray, 297; *Fisher* v. *Boston*, (1870) 104 Mass. 87; *Pettingell* v. *Chelsea*, (1894) 161 Mass. 368; *Burrill* v. *Augusta*, (1886) 78 Maine, 118; *Edgerly* v. *Concord*, (1879) 59 New Hampshire, 78, and (1882) 62 New Hampshire, 8; *Welsh* v. *Rutland*, (1883) 56 Vermont, 228; *Dodge* v. *Granger*, (1892) 17 Rhode Island, 664; *Jewett* v. *New Haven*, (1870) 38 Connecticut, 368; *Wild* v. *Paterson*, (1885) 18 Vroom, (47 N. J. Law) 406; *Hayes* v. *Oshkosh*, (1873) 33 Wisconsin, 314; *Howard* v. *San Francisco*, (1875) 51 California, 52.

But the same view has prevailed in those States where a different view is taken of the question of the liability of cities for defects in highways and bridges. In the States of New York, Pennsylvania, Ohio, Illinois, Kentucky, Missouri, Mississippi, Iowa, Minnesota, Nebraska and Washington, (as appears in Shearman and Redfield on Negligence, *ubi supra*,) cities are held liable to private actions for damages from defects in highways. Yet in each of those States it has been adjudged that cities are not liable to actions for negligence of members of their fire department engaged in the line of their duty.

In the case at bar, the decree of the District Court in favor of the libellant against the city of New York proceeded upon the ground that by the local law of New York an action could be maintained against the city by the owner of property injured by the negligence of members of its fire department. The Circuit Court of Appeals came to the opposite conclusion; and upon careful examination of the New York decisions we are satisfied that the Circuit Court of Appeals was right upon that question.

In the Court of Appeals of the State of New York, the law has long been settled that a municipal corporation having a charter from the State, which requires it to construct and maintain highways and bridges, is liable to a person suffering injury in person or property by a defect in the construction or repair of either by the negligence of the commissioner of highways. *Hutson* v. *New York*, (1853) 9 N. Y. 163; *Conrad* v. *Ithaca*, (1857) 16 N. Y. 158, 161; *Requa* v. *Rochester*, (1871) 45 N. Y. 129; *Hume* v. *New York*, (1878) 74 N. Y. 264; *Ehrgott* v. *New York*, (1884) 96 N. Y. 264; *Hughes* v. *Monroe*, (1895) 147 N. Y. 49, 57; *Missano* v. *New York*, (1899) 160 N. Y. 123.

But that court has constantly held otherwise in regard to negligence of members of the fire department, the police department, or even of the department of public charities, of public health, or of public instruction.

In *Maxmilian* v. *New York*, (1875) 62 N. Y. 160, which has always been considered a leading case, Judge Folger, delivering the unanimous judgment of the court, said: "There are two kinds of duties which are imposed upon a municipal corporation: One is of that kind which arises from the grant of a special power, in the exercise of which the municipality is as a legal individual; the other is of that kind which arises, or is implied, from the use of political rights under the general law, in the exercise of which it is as a sovereign. The former power is private, and is used for private purposes; the latter is public, and is used for public purposes. The former is not held by the municipality as one of the political divisions of the State; the latter is. In the exercise of the former power, and under the duty to the public which the acceptance and use of the power involves, a municipality is like a private corporation, and is liable for a failure to use its power well, or for an injury caused by using it badly. But where the power is intrusted to it as one of the political divisions of the State, and is conferred not for the immediate benefit of the municipality, but as a means to the exercise of the sovereign power for the benefit of all citizens, the corporation is not liable for non-user nor for mis-user by the public agents." 62 N. Y. 164, 165. The previous decisions holding municipal corporations liable to private actions for defects in highways or bridges were placed upon the ground that "the duty of keeping in repair streets, bridges and other common ways of passage, and sewers, and a liability for a neglect to perform that duty, rest upon an express or implied acceptance of the power, and an agreement so to do. It is a duty with which the city is charged for its own corporate benefit, to be performed by its own agents, as its own corporate act." 62 N. Y. 170. But it was adjudged that the city was not liable for a personal injury caused by the negligence of the driver of an ambulance employed by the commissioners of public charities and correction, because the powers and duties of those commissioners were such as were to be exercised and performed, in every local political division of the State, not for the peculiar benefit of that division, but for the whole public, in the discharge of its duty to care for paupers, lunatics and prisoners. 62 N. Y. 168.

In *Ham* v. *New York*, (1877) 70 N. Y. 459, the decision in *Maxmilian's case* was approved, and was followed in holding that the city was not liable to one whose property was injured in consequence of the negligent construction of a school-house by the department of public instruction of the city.

More directly in point is *Smith* v. *Rochester*, (1879) 76 N. Y. 506, in which it was held that no action against the city could be maintained by

a person injured by the negligent driving of a hose cart along the street, pursuant to a vote of the city council directing the fire department to assemble in front of the city hall at midnight, as part of a celebration of the centennial anniversary of the National Independence. The judgment was put, not only upon the ground that the city had no authority to employ the horses and wagons of the fire department for a midnight parade of the fire department to celebrate the centennial anniversary of the nation, but upon the additional and distinct ground that, assuming that the city had such authority under the statutes of New York, "the difficulty in maintaining the plaintiff's action is the well settled rule, that a municipal corporation is not liable for the negligence of firemen while engaged in the line of their duty." 76 N. Y. 513.

In *Terhune* v. *New York,* (1882) 88 N. Y. 247, it was held that an officer of the fire department could not maintain an action against the city for his wrongful dismissal from office by the fire commissioners, because, as was said by Judge Earl, citing the cases of *Maxmilian*, of *Ham* and of *Smith*, above referred to, "the fire commissioners were public officers, and not agents of the city." 88 N. Y. 251. See also *Springfield Ins. Co.* v. *Keeseville,* (1895) 148 N. Y. 46.

Quite in line with these decisions is *Farley* v. *New York,* (1897) 152 N. Y. 222, 227, which was an action by the driver of a hose carriage against the city to recover damages for injuries caused by driving against an obstruction in the highway. The New York statute of 1882, c. 410, (consolidating the laws affecting public interests in the city of New York,) provides in § 444 that "the officers and men of the fire department, with their apparatus of all kinds, when on duty, shall have the right of way at any fire, and in any highway, street or avenue, over any and all vehicles of any kind, except those carrying United States mail;" and in § 1932 that no person shall drive or ride any horse through any street in the city faster than five miles an hour. The Court of Appeals, speaking by Chief Justice Andrews, said: "The safety of property and the protection of life may and often do depend upon celerity of movement, and require that the greatest practicable speed should be permitted to the vehicles of the fire department in going to fires. Section 1932 was intended to regulate the speed of horses travelling on the streets and using them for the ordinary purposes of travel, and from the nature of the exigency cannot apply to the speed of vehicles of the fire department on their way to fires." The further decision that negligence on the part of the driver would defeat his action against the city has no tendency to show that such negligence could render the city liable to third persons.

In the very recent case of *Missano* v. *New York,* 160 Y. N. 123, in which it was held that keeping the streets clean stood upon the same ground as keeping them in repair, and that the city was therefore liable for a per-

sonal injury caused by the negligence of the driver of an ash cart of the street-cleaning department, the court again affirmed the established distinction between such cases and those in which the corporation exercised a public and governmental power for the benefit of the whole public and as the delegate and representative of the State; and quoted with approval the statement of Judge Wallace in a similar case in the Circuit Court of the United States, where, speaking of the commissioner of the street-cleaning, he said, "His duties, unlike those of the officers of the departments of health, charities, fire and police, although performed incidentally in the interest of the public health, are more immediately performed in the interest of the corporation itself which is charged with the obligation of maintaining its streets in fit and suitable condition for the use of those who resort to them." *Barney Co.* v. *New York*, (1889) 40 Fed. Rep. 50. See also *Hughes* v. *Auburn*, (1899) 161 N. Y. 96, 103, 104; and the decisions of the District Court of the United States for the Southern District of New York in *Haight* v. *New York*, (1885) 24 Fed. Rep. 93, and in *Edgerton* v. *New York*, (1886) 27 Fed. Rep. 230.

The highest courts of the States of Pennsylvania, Ohio, Illinois, Kentucky, Missouri, Mississippi, Iowa, Minnesota, Nebraska and Washington, also, as already mentioned, have adjudged that no private action can be maintained to recover damages against a city for an injury caused by negligence of members of its fire department while engaged in their official duties. The decisions are so uniform, and treat the point as so well settled, that it is enough to cite them, without stating them in detail. They are as follows: *Knight* v. *Philadelphia*, (1884) 15 Penn. Weekly Notes, 307; *Fire Insurance Patrol* v. *Boyd*, (1888) 120 Penn. St. 624, 646; *Kies* v. *Erie*, (1890) 135 Penn. St. 144, 149; *Frederick* v. *Columbus*, (1898) 58 Ohio St. 538, 546; *Wilcox* v. *Chicago*, (1883) 107 Illinois, 334, 338–340; *Greenwood* v. *Louisville*, (1877) 13 Bush, 226; *Davis* v. *Lebanon*, (Kentucky, 1900) 57 Southwestern Reporter, 471; *Heller* v. *Sedalia*, (1873) 53 Missouri, 159; *McKenna* v. *St. Louis*, (1878) 6 Missouri App. 320; *Alexander* v. *Vicksburg*, (1891) 68 Mississippi, 564; *Saunders* v. *Fort Madison*, (Iowa, 1900) 82 Northwestern Reporter, 428; *Grube* v. *St. Paul*, (1886) 34 Minnesota, 402; *Gillespie* v. *Lincoln*, (1892) 35 Nebraska, 34, 46; *Lawson* v. *Seattle*, (1893) 6 Wash. St. 184.

The law on this point, as understood and administered throughout the country by the highest courts of all the States in which the question has arisen, is unqualifiedly recognized by the principal text-writers. Mr. Dillon, for instance, after observing that "police officers appointed by a city are not its agents or servants, so as to render it responsible for their unlawful or negligent acts in the discharge of their duties," goes on to say: "So, although a municipal corporation has power to extinguish fires, to establish a fire department, to appoint and remove its officers, and to make

regulations in respect to their government and the management of fires, it is not liable for the negligence of firemen appointed and paid by it, who, when engaged in their line of duty upon an alarm of fire, ran over the plaintiff, in drawing a hose-reel belonging to the city, on their way to the fire; nor for injuries to the plaintiff, caused by the bursting of the hose of one of the engines of the corporation, through the negligence of a member of the fire department; nor for negligence whereby sparks from the fire engine of the corporation caused the plaintiff's property to be burned. The exemption from liability, in these and like cases, is upon the ground that the service is performed by the corporation in obedience to an act of the legislature; is one in which the corporation, as such, has no particular interest and from which it derives no special benefit in its corporate capacity; that the members of the fire department, although appointed by the city corporation, are not the agents and servants of the city for whose conduct it is liable; but they act rather as officers of the city, charged with a public service, for whose negligence in the discharge of official duty no action lies against the city without being expressly given; and the maxim of *respondeat superior* has therefore no application." 2 Dillon on Municipal Corporations, (4th ed.) §§ 975, 976. See also 1 Shearman and Redfield on Negligence, § 265; Tiedeman on Municipal Corporations, § 333*a*; 1 Beach on Public Corporations, § 744; 13 Amer. & Eng. Encycl. of Law, (2d ed.) 78.

The libellant relied on *Mersey Docks* v. *Gibbs*, L. R. 1 H. L. 93, in which the members of the town council of Liverpool and their successors, who had been formed by acts of Parliament into a corporation by the style of the Trustees of the Liverpool Docks, were held liable to an action for an injury to a vessel from a bank of mud which had been negligently suffered to remain in the docks. That decision proceeded upon the ground that the trustees of the docks were one of those corporations formed for trading and other profitable purposes, and in their very nature substitutions on a large scale for individual enterprise; supplying to those using the docks the same accommodation and the same services that would have been supplied by ordinary dock proprietors to their customers; and being paid for such accommodation and services sums of money, constituting a fund which, although not belonging to them for their own use, was devoted to the maintenance of the works, and presumably to pay claims against the corporation for injuries caused by their negligence. See L. R. 1. H. L. 105–107, 122. It was of such bodies, that Lord Cranworth, after observing that the fact that the appellants, in whom the docks were vested, did not collect tolls for their own profit, but merely as trustees for the benefit of the public, made no difference in principle in respect to their liability, went on to say: "It would be a strange distinction to persons coming with their ships to different ports of this country, that in some ports, if

they sustain damage by the negligence of those who have the management of the docks, they will be entitled to compensation, and in others they will not; such a distinction arising, not from any visible difference in the docks themselves, but from some municipal difference in the constitution of the bodies by whom the docks are managed."

But the City of New York, in establishing and carrying on a fire department, is not a substitution for individual enterprise; nor does it perform any such services as ordinary individuals might perform to their customers; nor does it receive any compensation for the use of the fire-boat, or from those benefited by the acts of the fire department.

The decisions of this court contain nothing, to say the least, inconsistent with the conclusion that no action at law could be maintained in such a case as this.

This court, taking the same view of the liability of municipal corporations to actions at law for injuries caused by defects in highways or bridges, which has prevailed in New York and in most of the States, has held that an action of that kind may be maintained in the courts of the District of Columbia; *Weightman* v. *Washington*, (1861) 1 Black, 39; *Barnes* v. *District of Columbia*, (1875) 91 U. S. 540; *District of Columbia* v. *Woodbury*, (1890) 136 U. S. 450; *Bauman* v. *Ross*, (1897) 167 U. S. 548, 597; or in the courts of a Territory; *Nebraska City* v. *Campbell*, (1862) 2 Black, 590; or in the Circuit Court of the United States held in a State whose courts maintain such an action, as in New York, *New York* v. *Sheffield*, (1866) 4 Wall. 189; in Illinois, *Chicago* v. *Robbins*, (1862) 2 Black, 418, and (1866) 4 Wall. 657, and *Evanston* v. *Gunn*, (1878) 99 U. S. 660; in Virginia, *Manchester* v. *Ericsson*, (1881) 105 U. S. 347; or in Ohio, *Cleveland* v. *King*, (1889) 132 U. S. 295; but that in a State where, as in Michigan, its highest court holds that a municipal corporation is not liable to such an action, no such action will lie in the Circuit Court of the United States, because, as was said by Mr. Justice Brewer in delivering judgment, the question "is not one of general commercial law; it is purely local in its significance and extent." *Detroit* v. *Osborne*, (1890) 135 U. S. 492, 498.

In the leading case of *Weightman* v. *Washington*, which was an action against the city of Washington for injuries caused by a defect in a bridge, the court said: "In view of the several provisions of the charter, not a doubt is entertained that the burden of repairing or rebuilding the bridge was imposed upon the defendants in consideration of the privileges and immunities conferred by the charter." 1 Black, 51. And the court took occasion, by way of precaution, to observe that powers granted by the legislature to a municipal corporation to pass ordinances prescribing and regulating the duties of policemen and firemen "are generally regarded as discretionary, because, in their nature, they are legislative; and although it is the duty of such corporations to carry out the powers so granted and

make them beneficial, still it has never been held that an action on the case would lie against the corporation, at the suit of an individual, for the failure on their part to perform such a duty." 1 Black, 49.

In *Barnes* v. *District of Columbia*, the action was for a defect in a street in the District of Columbia, constituted a municipal corporation by the act of Congress of February 21, 1871, c. 62, which vested in a board of public works appointed by the President, the entire control and regulation of the streets, avenues and alleys of the city. 16 Stat. 419, 427. The decision proceeded upon the ground that the care of the streets was "peculiarly a municipal duty," and that the board of works, being charged by Congress with the exclusive control of the streets, was, in that respect, like an ordinary agent of the city, and its proceedings were proceedings of the city. 91 U. S. 547, 555.

But there is no ground for assuming that the duty of putting out fires was imposed upon the city of New York "in consideration of the immunities and privileges conferred by the charter," or was "peculiarly a municipal duty."

In *Bowditch* v. *Boston*, (1879) 101 U. S. 16, it was adjudged that no action would lie, either at common law or by statute, against the city of Boston to recover damages for the destruction of a building, blown up under a general order of the chief engineer of the city to prevent the spreading of a conflagration; that the action, not being maintainable at common law, could only be supported by an express statute; and that the statutes of Massachusetts, as construed by the highest court of the State, did not authorize such an action against the city, except for the destruction of a building by specific order of three firewards or engineers acting jointly. In support of the position that the action would not lie at common law, this court relied on the ancient rule, as stated by Coke, that "for the commonwealth a man shall suffer damage; as, for saving of a city or town, a house shall be plucked down if the next be on fire; and a thing for the commonwealth every man may do without being liable to an action." *Case of the King's Prerogative in Saltpetre*, 12 Rep. 12, 13. The expression "the commonwealth" was evidently used by Coke as equivalent to "the common weal" or "the public welfare;" for he added, after the proposition above quoted, "as it is said in 3 H. 8, fol. 15," evidently intending to refer to the Year Book of 13 Hen. VIII, 15, 16, in which the rule is introduced by the words "the common wealth shall be preferred before private wealth;" and in a statement of the rule in a case in 29 Hen. VIII the corresponding expression is "the common weal." *Maleverer* v. *Spinke*, Dyer, 35*a*, 36*b*.

The precise question whether a municipal corporation is liable to an action at law for injuries caused by negligence of members of its fire department has never been decided or considered by this court.

But the principles affirmed and illustrated in the authorities already cited forbid the maintenance of a private action against a municipal corporation

for injuries caused by the negligence of members of a fire department, while engaged in the performance of their official duties.

The putting out of fires which are in danger of spreading is for the benefit of the whole public, and for the protection of the property of all. The danger is so great and imminent that it is especially one of those cases in which the public safety must be preferred to private interests. *Salus populi suprema lex.* It is the public good, the general welfare, that justifies the destruction of neighboring buildings to prevent the spreading of a fire which as yet rages in one building only. The duty of protecting, so far as may be, all property within the State against destruction by fire, is a public and governmental duty, which rests upon the government of the State; and it does not cease to be a duty of that character because the State has delegated it to, or permitted it to be performed by, a municipal corporation. When entrusted by the legislature to a municipal corporation, a political division of the State, it is not for the peculiar benefit of that corporation or division, but for its benefit in common with the whole public. A fire department is established in a municipality, not merely for the protection of buildings and property within the municipality itself, but equally for the protection of buildings and property beyond its limits, to which a fire originating within those limits may be in danger of spreading. Moreover, the necessity and appropriateness of the course and measures to be taken to stay a conflagration must be promptly determined, in the first instance, by those charged with the performance of the duty at the time of the exigency; and often cannot be as accurately judged of long after the fact. The members of the fire department of a city, therefore, whether appointed by the municipal corporation or otherwise, are not mere agents or servants of the corporation, but are public officers charged with a public service; and for their acts or their negligence in the performance of this service no action lies against the corporation, unless expressly given by statute.

It appears to us to be equally clear that no suit upon a like cause of action can be maintained in a court of admiralty; or, as expressed by the Circuit Court of Appeals in this case, "That the suit is brought in a court of admiralty instead of a common law court, and that the negligence consisted in the improper navigation of the vessel, cannot affect the conclusion." 35 U. S. App. 204.

It was argued that all the admiralty courts of the United States should be governed by one rule of maritime law, without regard to local decisions. Such is doubtless the case in the courts of admiralty, as it is in the other courts of the United States, upon questions of general commercial law. *Liverpool Steam Co.* v. *Phenix Ins. Co.*, (1889) 129 U. S. 397, 443. Courts of admiralty are also governed by their own rules, and not by the common law or by local statute, in matters affecting their own jurisdiction and procedure, as, for instance, in regard to the rules of navigation in navi-

gable waters; *The New York*, (1855) 18 How. 223; to the limitation of the liability of shipowners; *Butler* v. *Boston Steamship Co.*, (1889) 130 U. S. 527; to the duration, the enforcement and the marshalling of maritime liens; *The Chusan*, (1842) 2 Story, 455, 462; *The Lottawanna*, (1874) 21 Wall. 558; *The J. E. Rumbell*, (1893) 148 U. S. 1, 17; and to the effect of contributory negligence of a suitor upon his right to recover and upon the assessment of damages. *Atlee* v. *Packet Co.*, (1874) 21 Wall. 389, 395; *The Max Morris*, (1890) 137 U. S. 1. But the decision of this case does not turn upon any such question.

By the general admiralty law of this country, often declared by this court, a ship, by whomsoever owned or navigated, is liable for an actionable injury resulting from the negligence of her master or crew to another vessel. *The Malek Adhel*, (1844) 2 How. 210, 233, 234; *The China*, (1868) 7 Wall. 53, 68; *Ralli* v. *Troop*, (1895) 157 U. S. 386, 403; *The John G. Stevens*, (1898) 170 U. S. 113, 120. But that does not warrant the inference that a libel *in personam* can be maintained against the owner for a tort which would neither sustain a libel *in rem* against the ship, nor an action at law against her owner.

There is no case, we believe, in which a libel in admiralty has been maintained by this court, as for a tort, upon a cause of action on which, by the law prevailing throughout the country, no action at law could be maintained. On the contrary, it has repeatedly held that, as no action lies at common law for the death of a human being, no suit for a death caused by the negligence of those in charge of a vessel on navigable waters, either within a State or on the high seas, can be maintained in admiralty in the courts of the United States, in the absence of an act of Congress, or a statute of the State, giving a right of action therefor; and in delivering judgment in the leading case Chief Justice Waite said: "We know of no country that has adopted a different rule on this subject for the sea from that which it maintains on the land, and the maritime law, as accepted and received by maritime nations generally, leaves the matter untouched." "The rights of persons in this particular under the maritime law of this country are not different from those under the common law, and as it is the duty of courts to declare the law, not to make it, we cannot change the rule." *The Harrisburg*, (1886) 119 U. S. 199, 213; *The Alaska*, (1889) 130 U. S. 201; *The Corsair*, (1892) 145 U. S. 335; *The Albert Dumois*, (1900) 177 U. S. 240, 259.

The cases of *The Siren*, (1868) 7 Wall. 152, and *The Davis*, (1869) 10 Wall. 15, related wholly to claims against the United States, as compared with claims against private persons; no question of the liability of municipal corporations was contested by the parties, or alluded to by the court; and neither decision has any tendency to support the libel in the present case. In *The Siren*, a claim against a prize ship for damages from a colli-

sion with her while in the possession of the prize crew was sustained against the proceeds of the sale after condemnation, solely because the United States were the actors in the suit to have her condemned. So in *The Davis*, salvage against goods belonging to the United States, and part of the cargo of a private ship, was allowed because the possession of her master was not the possession of the United States, and the United States could only obtain the goods by claiming them in court. In short, in each case, as Mr. Justice Miller afterwards pointed out, "the Government came into court of its own volition to assert its claim to the property, and could only do so on condition of recognizing the superior rights of others." *Case* v. *Terrell*, (1870) 11 Wall. 199, 201. The opinion in each of the three cases distinctly affirmed the well settled doctrine of our law, that no suit can be maintained in a judicial tribunal against a State, or against its property, without its consent. See also *Cunningham* v. *Macon & Brunswick Railroad*, (1883) 109 U. S. 446, 451; *Stanley* v. *Schwalby*, (1892) 147 U. S. 508, 512, and (1896) 162 U. S. 255, 270; *Belknap* v. *Schild*, (1896) 161 U. S. 10, 16; *Briggs* v. *Light-boats*, (1865) 11 Allen, 156, 179–185. In England, it is equally well settled that no libel in admiralty can be maintained against the Crown, or against a foreign sovereign, or against any property of either, without his consent. See *The Lord Hobart*, (1815) 2 Dodson, 100; *The Athol*, (1842) 1 W. Rob. 374; *The Parlement Belge*, (1880) 5 Prob. D. 191, in which the Court of Appeal, speaking by Lord Justice Brett, (since Lord Esher, M. R.,) reversed the exceptional decision of Sir Robert Phillimore in 4 Prob. D. 147. The decisions that no suit can be maintained against the sovereign without his consent have certainly no tendency to support a suit against a municipal corporation for negligence in exercising powers delegated to it as a political division of the State, or to its officers, for the benefit of the whole public, and not for the benefit of the corporation only.

The cases of *The Blackwall*, (1869) 10 Wall. 1, *The Clarita and The Clara*, (1874) 23 Wall. 1, and *The Connemara*, (1883) 108 U. S. 352, related to the rights and liabilities of private persons engaged in saving, or attempting to save, vessels from imminent danger of destruction by fire; and decided nothing as to the rights or liabilities of municipal corporations or of their firemen. In *The Clarita*, it was a private corporation owning a ferry boat that was held liable for negligence while engaged in an attempt to save a vessel from destruction by fire; and *The Blackwall*, *The Clara* and *The Connemara* concerned the allowance of salvage to private salvors for services in putting out a fire on a vessel. In *The Blackwall*, the court avoided, as unnecessary to the decision, the expression of any opinion upon the question whether members of a fire department could recover salvage for such services. 10 Wall. 12. It was afterwards decided by Mr. Justice Bradley, sitting in the Circuit Court, that they

could not, because "the firemen were merely engaged in the line of their duty," and "the attempt to make the performance of this duty a ground of salvage, when it is a ship that takes fire, is against wise policy." *The Mary Frost*, (1876) 2 Woods, 306; *The Suliote*, (1880) 4 Woods, 19.

In *The F. C. Latrobe*, (1886) 28 Fed. Rep. 377, in the District of Maryland, and in *Gavagnin* v. *Philadelphia*, (1894) 59 Fed. Rep. 303, and 17 U. S. App. 642, and in *Guthrie* v. *Philadelphia*, (1896) 73 Fed. Rep. 688, in the Eastern District of Pennsylvania, in each of which a libel in admiralty was maintained against a city for a collision with the libellant's vessel of a steamboat maintained by the city for the purpose of clearing its harbor of ice, the steamboat, at the time of the collision, was not engaged in its usual public service, but in a special service for a private benefit; and stress was laid upon that fact in each of the opinions.

The decisions of the Circuit Court of the United States in Massachusetts in *Boston* v. *Crowley*, (1889) 38 Fed. Rep. 202, and of the District Court of the United States in Connecticut, in *Greenwood* v. *Westport*, (1894) 60 Fed. Rep. 560; *S. C.* 63 Connecticut, 587; were only that libels in admiralty *in personam* could be maintained against a city or town for injuries caused to vessels by not keeping open a draw in a bridge. It may also be observed that in *Crowley's case* the decision was not in accord with the earlier decision in *French* v. *Boston*, (1880) 129 Mass. 592, and proceeded upon the assumption (38 Fed. Rep. 204) that the question was one of general municipal or commercial law upon which the courts of the United States were not bound to follow the decisions of the highest courts of the State—an assumption inconsistent with the later judgment of this court in *Detroit* v. *Osborne*, 135 U. S. 492, 498, above cited. In *Greenwood's case* the question was considered to be an open one in the courts of Connecticut; and it has since been decided the other way by the highest court of the State. 60 Fed. Rep. 569, 575, 576; *Daly* v. *New Haven*, (1897) 69 Connecticut, 644.

The only instance cited at the bar, in which a libel in admiralty has been maintained in such a case as the present, is that of *Thompson Navigation Co.* v. *Chicago*, (1897) 79 Fed. Rep. 984, decided by the District Court for the Northern District of Illinois since this suit was commenced, and avowedly a departure from the case of *The Fidelity*, (1878) 9 Benedict, 333, and (1879) 16 Blatchford, 569, in the Southern District of New York, in which it was held by Mr. Justice Blatchford, then District Judge, and by Chief Justice Waite in the Circuit Court on appeal, that a libel *in rem* could not be maintained in admiralty against a steam tug owned by the city of New York, and under the exclusive control of the commissioners of public charities and correction, and employed in the performance of their official duties, for her collision with the libellant's vessel through the negligence of those in charge of the tug.

The duty of the State to protect the property of all from destruction by fire covers vessels in its harbors, as well as buildings within its territory. The authority of the fire department and its members as to both kinds of property is derived from the municipal law, and not from the maritime law. *Ralli* v. *Troop*, 157 U. S. 386, 419, 420. All the shipping, foreign and domestic, in the port, is under the same safeguard, and subject to the same risks. Prompt, decisive and unembarrassed action of the firemen is necessary to the protection of both buildings and vessels from the dangers of a conflagration. The necessity of allowing a municipal fire-boat to proceed on her way to put out a fire affords a special reason for not allowing her, while so occupied, to be seized on a libel *in rem*. But all the reasons for not maintaining an action of this kind against the city in a court of common law apply with undiminished force to a libel against the city *in personam* in a court of admiralty.

In any aspect of the case, therefore, we are of opinion that this suit cannot be maintained against the city of New York; not by the local law of New York, because that law, as declared by the Court of Appeals of the State, is against the maintenance of such a suit; not by the maritime law, because according to the municipal law prevailing throughout this country, as declared by the highest court of every State in which the question has arisen, cities are not liable to such suits, and no authoritative precedent or satisfactory reason has been produced for applying a different rule in a court of admiralty.

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